Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

DENNIS LEE HENDRIX, Individually and in his Official capacity as Sheriff of Forsyth County, EARL A. SINGLETARY, Individually and in his Official Capacity as Chief Deputy Sheriff of Forsyth County, DAVID W. WATERS, Individually and in his Official Capacity as a Deputy Sheriff of Forsyth County, PETITIONERS

v.

DANNY M. BENNETT AND DANNY L. REID

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition for writ of certiorari arises out of the denial of Petitioners' assertion of qualified immunity from Respondents' First Amendment retaliation claim. Rejecting Petitioners' qualified immunity defense, the United States Court of Appeals for the Eleventh Circuit decided an issue of first impression for that court: What is the appropriate standard for assessing whether a private citizen plaintiff has suffered an "adverse action" sufficient to support a First Amendment retaliation claim.

In resolving this issue, the Eleventh Circuit, joining several other Courts of Appeals, determined the appropriate test is the "ordinary firmness" test, under which a plaintiff suffers an adverse action if the defendant's allegedly retaliatory conduct would likely deter a person of ordinary firmness from the exercise of First Amendment rights. In so doing, the Eleventh Circuit rejected decisions from the United States Courts of Appeals for the First and Second Circuits applying an "actual chilling" test, under which a plaintiff must show that the defendant's actions had some actual, non-speculative chilling effect on his or her First Amendment rights.

This petition presents the following significant issues:

1. Whether this Court should adopt the "actual chilling" test (applied by the First and Second Circuits) or the "ordinary firmness" test (applied by several Courts of Appeals including the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits) in assessing the adverse action requirement of a First Amendment

retaliation claim brought by a private citizen.

2. Whether the law can be sufficiently clearly established to defeat a government official's qualified immunity when the central issue of the case is one of first impression in the governing circuit and conflicting decisions exist on the issue outside that circuit.

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The published opinion of the Eleventh Circuit in *Bennett v. Hendrix*, Case No. 04-12256, 423 F.3d 1247 (11th Cir. 2005), filed September 9, 2005, affirming the district court's denial of Petitioners' assertion of qualified immunity from suit on summary judgment, is reproduced in the Appendix hereto. (Pet. App. 1a-19a).

The unpublished order of the United States District Court for the Northern District of Georgia (Atlanta Division) in *Bennett v. Hendrix*, Case No. 1:00-CV-2520-TWT, filed April 13, 2004, denying Petitioners' assertion of qualified immunity on summary judgment, is reproduced in the Appendix hereto. (Pet. App. 20a-33a).

The unpublished order of the Eleventh Circuit in *Bennett v. Hendrix*, Case No. 04-12256, filed November 7, 2005, denying Petitioners' petition for rehearing en banc, is reproduced in the Appendix hereto. (Pet. App. 34a).

JURISDICTION

In its September 9, 2005 opinion, the Eleventh Circuit affirmed the district court's denial of Petitioners' assertion of qualified immunity on summary judgment. Petitioners timely filed a petition for rehearing en banc on September 30, 2005, which was denied by the Eleventh Circuit on November 7, 2005. (Pet. App. 34a).

This petition for writ of certiorari is filed within 90 days of the date of the Eleventh Circuit's denial of

Petitioners' petition for rehearing en banc pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.3 and 30. This Court has jurisdiction to review on a writ of certiorari the Eleventh Circuit's opinion pursuant to 28 U.S.C. § 1254(a); 28 U.S.C. § 1291; and *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

RELEVANT PROVISIONS INVOLVED

U.S. CONST. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the

purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

This 42 U.S.C. § 1983 case arises out of Danny Bennett's, Danny Reid's ("Respondents"), and Tammy Bennett's[1] allegations that Sheriff Dennis Lee Hendrix, Deputy Earl Singletary, and Major David Waters ("Petitioners") retaliated against them for their political support of a referendum. This referendum would have transferred the primary law enforcement powers from the existing Sheriff's Department and create a new county-wide police force that would be under the direct supervision of the county commission. (R14-176-3; R16-233-1). Sheriff Hendrix did not support the referendum, and the referendum was ultimately defeated. (R14-176-3; R16-233-2-3).

Respondents allege Sheriff Hendrix retaliated against them as a result of their support for the referendum by directing Deputy Singletary, Major Waters, and other county officers to engage in acts of surveillance and harassment. (R1-1-16-17; R14-176-14; R16-233-3). Respondents also contend that Sheriff Hendrix retaliated against them in connection with his re-election campaign by disseminating campaign fliers that personally attacked Respondents. (R14-176-4-5).

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[1] The district court granted summary judgment to Petitioners as to the claims brought by Tammy Bennett, and thus she is not a party to this appeal. (Pet. App. 18a n.2).

On September 28, 2000, Danny Bennett, Danny Reid, and Tammy Bennett filed this civil rights action. (R1-1-1). As relevant here, Respondents alleged that Petitioners violated the First Amendment by retaliating against them as a result of their political support for the Forsyth County referendum, conspired to deprive them of their constitutional rights under 42 U.S.C. §§ 1983 and 1985(3), and violated their equal protection rights by discriminating against them in retaliation for the exercise of their First Amendment rights. (R1-1-27, 39, 41, 43). Respondents also brought claims against Petitioners for violations of the Fourth Amendment and substantive due process, as well as a supervisory liability claim against Sheriff Hendrix and Deputy Singletary and various state law claims. (R1-1-33, 38, 42).

On June 21, 2001, the district court granted Petitioners' motion to dismiss as to all counts, except for Respondents' First Amendment, equal protection, and § 1983 conspiracy claims. (R6-89-36; R14-176-7, 22). Thereafter, on February 1, 2002, the district court granted in part and denied in part Petitioners' motion for summary judgment. (R14-176-48).

In particular, the district court granted Petitioners' motion for summary judgment with respect to (1) Respondents' First Amendment retaliation claim based upon Sheriff Hendrix's campaign fliers; (2) Tammy Bennetts' First Amendment retaliation claim; and (3) Respondents' equal protection claim. (R14-176-12, 15, 23). The district court, however, denied Petitioners' motion with respect to (1) Respondents' First Amendment retaliation claim based on Petitioners' alleged surveillance and harassment and (2)

Respondents' § 1983 conspiracy claim. (R14-176-18, 21). In regard to Petitioners' assertion of qualified immunity as to these claims, the district court determined that based on the record before it, it must "defer ruling on the qualified immunity defense until after the evidence at trial has been presented." (R14-176-28).

Petitioners thereafter appealed the deferral/denial of their qualified immunity to the Eleventh Circuit. (R14-186-1; R16-209-1). Following oral argument, the Eleventh Circuit vacated the district court's decision, concluding Petitioners had met their initial burden on qualified immunity of showing they were acting within their discretionary authority. (R16-222-4-5). Accordingly, the Eleventh Circuit remanded the case to the district court to analyze whether Petitioners are entitled to qualified immunity. (R16-222-5).

On April 13, 2004, the district court issued its order following the Eleventh Circuit's remand, denying Petitioners' qualified immunity defense. (R16-233-15). Following Petitioners' appeal from this decision, (R16-235-1), the Eleventh Circuit issued its opinion on September 9, 2005, denying Petitioners qualified immunity from suit. (Pet. App. 1a-19a). Petitioners thereafter filed a timely petition for rehearing en banc of this decision, which the full Eleventh Circuit denied on November 7, 2005. (Pet. App. 34a).

REASONS FOR GRANTING THE PETITION

A. Certiorari Should Be Granted To Resolve The Conflict Between The Courts of Appeals

This petition affords the Court with an opportunity to clarify the law and resolve a conflict between the Courts of Appeals concerning the appropriate standard to apply in assessing whether a private citizen plaintiff has suffered an "adverse action" sufficient to support a First Amendment retaliation claim.

The Eleventh Circuit, joining several other Courts of Appeals, determined the appropriate test is the "ordinary firmness" test; that is, "'[a] plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter a person of ordinary firmness from the exercise of First Amendment rights.'" (Pet. App. 6a); *see, e.g.*, *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005); *Keenan v. Tejeda*, 290 F.3d 252, 259 (5th Cir. 2002); *Tucker v. City of Richmond*, 388 F.3d 216, 220 (6th Cir. 2004); *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982); *Garcia v. City of Trenton*, 348 F.3d 726, 728 (8th Cir. 2003); *Mendocino Envtl. Ctr. v. Mendocino*, 192 F.3d 1283, 1300 (9th Cir. 1999); *Poole v. County of Otero*, 271 F.3d 955, 960 (10th Cir. 2001).[2]

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[2] The Eleventh Circuit also cited decisions from the First, Second, Third, and D.C. Circuits as support for the "ordinary firmness" test. (Pet. App. 6a-7a). None of these decisions, however, involved First Amendment claims brought by private citizens, such as this case. *See Agosto-de-Feliciano v. Aponte-Roque*, 889 F.2d 1209,

In so doing, the Eleventh Circuit rejected Petitioners' assertion that the proper test is the "actual chilling" test, under which a plaintiff must show that the defendant's actions had some actual, non-speculative chilling effect on his or her First Amendment rights. Significantly, the Eleventh Circuit's decision is in conflict with decisions of the First and Second Circuits, which have applied the "actual chilling" test. *See Sullivan v Carrick*, 888 F.2d 1, 4 (1st Cir. 1989) ("To show a First Amendment violation in this context [plaintiff] must allege that his speech **was in fact** chilled or intimidated[3] by

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1217 (1st Cir. 1989) (First Amendment retaliation claim brought by public employee); *Washington v. County of Rockland*, 373 F.3d 310, 320 (2d Cir. 2004) (First Amendment retaliation claim brought by public employee); *Dawes v. Walker*, 239 F.3d 489, 493 (2d Cir. 2001) (First Amendment retaliation claim brought by prisoner); *Mitchell v. Horn*, 318 F.3d 523, 530 (3d Cir. 2003) (First Amendment retaliation claim brought by prisoner); *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 585 (D.C. Cir. 2002) (First Amendment retaliation claim brought by prisoner). Indeed, as discussed *infra*, the Second Circuit has distinguished the private citizen line of cases from the prisoner and public employee cases.

[3] The Eleventh Circuit's suggestion that the First Circuit's use of the word "intimidated" somehow indicates the First Circuit was not applying an actual chilling test, (Pet. App. 18a-19a n.4), ignores the manner in which the First Circuit applied its rule to the facts of the case. Specifically, the First Circuit concluded the absence of any chilling effect, in and of itself, negated any suggestion that plaintiff was intimidated. *See Sullivan*, 888 F.2d at 4 ("The facts indicate that [plaintiff] was anything but intimidated. As shown by the December, 1985 filing of the present action, [plaintiff's] alleged[] [retaliatory act] never intimidated [plaintiff].").

Moreover, the Eleventh Circuit failed to recognize the numerous courts within the First Circuit that have cited *Sullivan*

[defendant's alleged retaliatory conduct]. . . . . Absent such an allegation, no violation occurred. . . . . Where a chilling effect is speculative, indirect, or too remote, finding an abridgment of First Amendment rights is unfounded.") (emphasis added); *Curley v. Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001) ("[P]laintiff must show . . that his First Amendment rights were "actually chilled." . . . . **Where a party can show no change in his behavior, he has quite plainly shown no chilling of his First Amendment right to free speech.**") (emphasis added); *Connell v. Signoracci*, 153 F.3d 74, 79 (2d Cir. 1998) ("A plaintiff asserting . . . a First Amendment claim must allege[, among other things,] the defendant's action **effectively chilled the exercise of the plaintiff's First Amendment rights.**") (emphasis added); *Singer v. Fulton County Sheriff*, 63 F.3d 110, 120 (2d Cir. 1995) (finding no chilling effect where, after an arrest, the plaintiff continued to publish his newspaper through which he criticized the village government); *Spear v. Town of West Hartford*, 954 F.2d 63, 67 (2d Cir. 1992) (finding no chilling effect where, after the filing of the lawsuit, the plaintiff continued to write criticizing editorials in the same manner as before the lawsuit).

In an effort to dispel the conflict amongst the Courts of Appeals, the Eleventh Circuit, citing

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for the very same proposition as asserted by Petitioners, *i.e.*, that a plaintiff must show an actual chilling of his or her First Amendment rights to give rise to a viable claim. *See, e.g., Penney v. Town of Middleton*, 888 F. Supp. 332, 338 (D.N.H. 1994); *Abany v. Fridovich*, 1994 U.S. Dist. LEXIS 13049, at **15-16 (D. Mass. Jun. 20, 1994) (unpublished); *Therrien v. Hamilton*, 849 F. Supp. 110, 114 (D. Mass. 1994).

Washington v. County of Rockland, 373 F.3d 310, 320 (2d Cir. 2004) -- a case involving a First Amendment retaliation claim brought by a public employee -- indicated that "cases from the Second Circuit appear to take contradictory positions" concerning application of the "actual chilling" versus the "ordinary firmness" tests. (Pet. App. at 19a n.5). The Eleventh Circuit, however, failed to recognize that the Second Circuit has consistently applied the "actual chilling" test to First Amendment retaliation claims brought by private citizens, such as the case here.

Specifically, in *Gill v. Pidlypchak*, the Second Circuit explained it has "impose[d] an actual chill requirement" in the "line of cases . . . involving criticism of public officials by private citizens" while the "ordinary firmness" test has been applied in the prisoner context. 389 F.3d 379, 381 (2d Cir. 2004).

Since *Gill*, cases within the Second Circuit have continued to apply the "actual chilling" test in the private citizen context. *See, e.g., Gill v. Calescibetta*, 2005 U.S. App. LEXIS 26821, at*4 (2d Cir. Dec. 7, 2005) ("the [d]istrict [c]ourt granted summary judgment on the ground that plaintiff could not demonstrate that his speech was 'actually chilled' -- **a required element of a First Amendment retaliation claim in non-prison contexts**.") (citing *Curley*, 268 F.3d at 72-73) (emphasis added) (unpublished); *Dutkiewicz v. Hyjek*, 135 Fed. Appx. 482, 484 (2d Cir. 2005) (rejecting First Amendment claim where, among other things, "plaintiffs failed to allege that their speech was chilled") (unpublished); *Griffin-Nolan v. Providence Washington Ins. Co.*, 2005 U.S. Dist. LEXIS 12902, at *24-25 (N.D.N.Y. Jun. 20, 2005) ("All the Second Circuit cases

that the Court has found involving a private citizen plaintiff who alleges the defendant arrested him in retaliation for his exercise of First Amendment rights have articulated the same formulation of the elements of a First Amendment retaliation claim as did *Curley*.") (unpublished).

Moreover, along with differentiating its private citizen versus prisoner cases, the Second Circuit has distinguished its private citizen from its public employee cases. *See Morrison v. Johnson*, 429 F.3d 48, 51 (2d Cir. 2005) ("Where the plaintiff is a public employee alleging that he suffered an adverse employment action as retaliation for the exercise of his First Amendment rights, the standard is not the principle applied in *Curley*."); *Gill v. Calescibetta*, 2005 U.S. App. LEXIS 26821, at **5-6 (2d Cir. Dec. 7, 2005) ("[I]**n the narrow context of prisoner retaliation suits**, a prisoner need not demonstrate 'an actual or subjective chill.'") (emphasis altered from original and internal citations omitted) (unpublished).

Given the differentiating standards applied by the Second Circuit in the private citizen, prisoner, and public employee contexts, neither *Washington* nor *Dawes v. Walker*, 239 F.3d 489, 493 (2d Cir. 2001) -- a prisoner case quoted in *Washington* as support for the "ordinary firmness" test -- change the fact that the Second Circuit has applied and adopted an "actual chilling" test for First Amendment retaliation claims brought by private citizens.

In addition, the Eleventh Circuit's attempt to dispel the fact that a "circuit split" exists on the issue,

(Pet. App. at 8a), is in conflict with the views of its sister circuits which have recognized such a split exists:

For example, in *Rees v. Dahl*, the Tenth Circuit noted:

> Although we agree with the district court's ultimate conclusion that [plaintiffs'] complaint should be dismissed for failure to state a claim upon which relief can be granted, we rely on our own standard, announced in *Worrell [v. Henry*, 219 F.3d 1197 (10th Cir. 2000)] (objective chilling), rather than the Second Circuit's standard announced in *Spear [v. Town of West Hartford*, 954 F.2d 63 (2d Cir. 1992] (subjective chilling). In *Worrell*, we expressed our own three-part standard for evaluating First Amendment retaliation claims, which differs from the standard articulated by the Second Circuit in *Spear*. Whereas *Spear*'s standard focuses on a **subjective** chilling, *Worrell*, which binds us, provides for an **objective** standard.

24 Fed. Appx. 907, 910-11 (10th Cir. 2001) (unpublished) (emphasis in original).

Similarly, in *Keenan v. Tejeda*, the Fifth Circuit recognized the differing views of the courts, comparing decisions of the First, Second, and Fourth Circuits with decisions of the Ninth and Tenth Circuits:

> The district court correctly ruled that a retaliation claim requires some showing that the plaintiffs' exercise of free speech has been

> curtailed.[4] *See Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686 (4th Cir. 2000); *Spear v. Town of West Hartford*, 954 F.2d 63, 67 (2d Cir. 1992); *Sullivan v. Carrick*, 888 F.2d 1, 4 (1st Cir. 1989), *but see Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999) ("It would be unjust to allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity."); *Smith [v. Plati]*, 258 F.3d [1167,] 1177 [(10th Cir. 2001)] ("The focus . . . is upon whether a person of ordinary firmness would be chilled, rather than whether the particular plaintiff is chilled.").

290 F.3d 252, 259-60 (5th Cir. 2002); *see also Tucker v. City of Richmond*, 388 F.3d 216, 220 (6th Cir. 2004) ("this Circuit – **unlike some others** – has held that the relevant question is whether the defendants' actions are capable of deterring a person of ordinary firmness") (emphasis added and internal citations, quotations, and emphasis omitted).

Petitioners respectfully maintain the Eleventh Circuit's decision to adopt the "ordinary firmness" test was in error and that the First and Second Circuit decisions applying the "actual chilling" test are correct for several reasons. First, § 1983 is a tort statute, and as such, a § 1983 plaintiff should have to show an actual injury to prevail on his or her claim. Indeed, the

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[4] While the framework announced by the Fifth Circuit in *Keenan* included the ordinary firmness test, 290 F.3d at 258, the court went on to apply the test by inquiring whether plaintiffs showed some actual chilling of their First Amendment rights. *See id.* at 259-60.

Second Circuit's decision in *Colombo v. O'Connell* captures the essence of Petitioners' position:

> To state a claim under Section 1983, a plaintiff must allege facts indicating that some official action has caused the plaintiff to be deprived of his or her constitutional rights – in other words, there is an injury requirement to state a claim. In this case, [plaintiff] need not show that she was silenced by [defendant's] threatened suit – the First Amendment protects the right to free speech so far as to prohibit state action that merely has a chilling effect on speech.
>
> However, **to sustain her claim, [plaintiff] is required to show that the defendant's actions had some actual, non-speculative chilling effect.** Because [plaintiff] testified in her deposition that her speech was not restricted in fact by [defendant's] letter, that she "still felt free to speak up about whatever she wanted to say" after receiving [defendant's] letter, and alleged no actual chilling effect on the exercise of her First Amendment rights at all, [plaintiff's] claim fails.

310 F.3d 115, 117 (2d Cir. 2002) (emphasis added) (citations omitted); *see Curley*, 268 F.3d at 73 ("Where a party can show no change in his behavior, he has quite plainly shown no chilling of his First Amendment right to free speech.").

Likewise, here, Respondents have produced no legally sufficient evidence indicating any actual change or curtailment of their First Amendment activities as a

result of Petitioners' alleged conduct.[5] In fact, the evidence shows just the opposite: that Respondents continued to exercise their First Amendment rights in spite of Petitioners' alleged retaliatory conduct. *See* Reid Depo. at 92, 95, 156, 246 (indicating Reid voted in

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[5] In an effort to show their First Amendment rights were, in fact, chilled, Respondents simply pointed to their self-serving, conclusory deposition testimony in which they asserted they were "less willing" and "more reluctant" to participate in the political process as a result of Petitioners' alleged retaliatory conduct. (Respondents' 11th Cir. Br. at 43-44).

Contrary to the Eleventh Circuit's suggestion, (Pet. App. 15a), such self-serving, speculative, and conclusory assertions are insufficient to demonstrate an actual chilling of First Amendment rights – particularly given the undisputed evidence showing Respondents continued to participate in the political process despite Petitioners' alleged retaliatory conduct. *See, e.g., Columbo*, 310 F.3d at 117 ("[T]o sustain her claim, [plaintiff] is required to show that the defendant's actions had some actual, non-speculative chilling effect."); *Curley*, 268 F.3d at 73 (concluding plaintiff showed no chilling of his First Amendment rights when, although "he was arrested in retaliation for his comments made during the 1993 mayoral campaign, he continued his 1994 campaign for village trustee even after the arrest and ran again for public office in 1995"); *Hankard v. Town of Avon*, 126 F.3d 418, 424 (2d Cir. 1997) ("[P]laintiff's allegations fall short of constitutional significance. The chilling effect alleged by the plaintiffs is speculative, indirect and remote, and there is no evidence in the record that plaintiffs did in fact suffer a cognizable constitutional deprivation."); *Singer*, 63 F.3d at 120 (rejecting First Amendment claim where plaintiff "failed to allege with sufficient particularity any actual `chilling' of his speech, or of his participation in the political process"); *Spear*, 954 F.2d at 67 (2d Cir. 1992) (rejecting First Amendment retaliation claim where "[Plaintiff's] allegation of a chill . . . was conclusory and speculative"); *Sullivan*, 888 F.2d at 4 ("Where a chilling effect is speculative, indirect, or too remote, finding an abridgment of First Amendment rights is unfounded.").

the primary for sheriff; voted in the sheriff election run-off; contributed to Sheriff Hendrix's opponent's election campaign; and voted in general election); Bennett Depo. at 71, 136, 253 (indicating Bennett attended fundraiser for and contributed money to Sheriff Hendrix's opponent, attended Sheriff Hendrix's opponent's election night party). Accordingly, Petitioners respectfully maintain that Respondents have failed to demonstrate a constitutional violation – let alone one that was clearly established at the time of Petitioners' alleged conduct – and thus Petitioners are entitled to qualified immunity.

Second, by adopting the "ordinary firmness" test as opposed to the "actual chilling" test, the Eleventh Circuit has transformed retaliation claims into a "subspecies of First Amendment claims" which are given heightened protection. As former Chief Justice Rehnquist observed in his dissent in *Crawford-El v. Britton*:

> If the purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails, it is hard to see how that purpose is substantially advanced if petitioner's suit is allowed to proceed. Petitioner has already fully exercised his federally guaranteed rights. Providing compensation to him, even if his claim is meritorious, will foster increased constitutional freedoms only for the hypothetical subsequent individual who, given the imposition of liability in this case, will not be deterred from exercising his

> First Amendment rights out of fear that respondent will retaliate . . . .

523 U.S. 574, 608-09 (1998) (Rehnquist, C.J., dissenting) (joined by O'Connor, J.) (internal citations and quotations omitted).

Finally, the "actual chilling" test is consistent with the injury-in-fact requirement of federal justiciability law and the Court's instruction that "allegations of a subjective `chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972).

In view of the conflict between the Courts of Appeals concerning the appropriate standard for assessing whether a private citizen plaintiff has suffered an "adverse action" sufficient to support a First Amendment retaliation claim, as well as the justifications supporting the adoption of the "actual chilling" test, Petitioners respectfully maintain that certiorari is warranted.

B. Deciding This Case Together With Two Related Cases For Which Certiorari Has Already Been Granted Will Allow The Court To Clarify The Standards Applicable To First Amendment Retaliation Claims And The Adverse Action Requirements Of Both First Amendment Retaliation And Title VII Cases

In *Hartman v. Moore*, Case No. 04-1495, the Court will be considering whether a First Amendment

retaliatory prosecution claim can exist when the prosecution was supported by probable cause. Moreover, in *Burlington Northern Santa Fe Railway Co. v. White*, Case No. 05-259, the Court will be deciding the appropriate test to be applied to determine whether a plaintiff has suffered an "adverse employment action" under Title VII of the Civil Rights Act of 1964.

Deciding this case together with *Hartman* and *White* will allow the Court to cohesively clarify the standards applicable to First Amendment retaliation claims and the "adverse action" requirements of both First Amendment retaliation and Title VII cases.

C. This Case Presents The Court With The Opportunity To Clarify Whether The Law Can Be Sufficiently Clearly Established To Defeat A Government Official's Qualified Immunity When The Central Issue Of The Case Is One Of First Impression In The Governing Circuit And Conflicting Decisions Exist On The Issue Outside That Circuit

Despite the lack of binding precedent on the central issue of this case (what constitutes an "adverse action" sufficient to give rise to a valid First Amendment retaliation claim by a private citizen) and conflicting decisions from the Courts of Appeals that have addressed this question, the Eleventh Circuit rejected Petitioners' qualified immunity defense.

While the Courts of Appeals are split as to which decisional sources may be utilized when assessing the "clearly established" prong of the qualified immunity

analysis,[6] this Court has indicated that the law is too undeveloped to overcome qualified immunity where there is an absence of binding precedent from the governing circuit on the issue presented and conflicting decisions exist from the other circuits that have addressed the issue:

> Petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful. . . . . Given such an undeveloped state of the law, the officers in this case cannot have been expected to predict the future course

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[6] *Compare Higgason v. Stephens*, 288 F.3d 868, 876 (6th Cir. 2002) ("In inquiring whether a constitutional right is clearly established, we must look first to decisions of the Supreme Court, then to decisions of this court and other courts within our circuit, and finally to decisions of other circuits.") (internal quotations and citation omitted) *with Capoeman v Reed*, 754 F.2d 512, 514-15 (9th Cir. 1985) ("[I]n the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established . . . . Where . . . there are relatively few cases on point, and none of them are binding, an additional factor that may be considered in ascertaining whether the law is 'clearly established' is a determination of the likelihood that the Supreme Court or this circuit would have reached the same results as courts which had previously considered the issue.") *with Marsh v. Butler County*, 268 F.3d 1014, 1032-33 n.10 (11th Cir. 2001) (en banc) ("When case law is needed to "clearly establish" the law applicable to the pertinent circumstances, we look to decisions of the U.S. Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the pertinent state.").

> of constitutional law. Between the time of the events of this case and today's decision, a split amongst the Federal Circuits in fact developed on the question whether media ride-alongs that enter homes subject the police to money damages. If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.

Wilson v. Layne, 526 U.S. 603, 617-18 (1999) (internal citations and quotations omitted); *see also Moore v. Hartman*, 388 F.3d 871, 885 (D.C. Cir. 2004), *cert. granted*, 125 S. Ct. 2977 (2005) ("The law of other circuits may be relevant to qualified immunity, but only in the event that no cases of `controlling authority' exist in the jurisdiction where the challenged action occurred.").

Given the Eleventh Circuit's implicit decision to the contrary, this case presents the Court with the opportunity to clarify whether the law can be sufficiently clearly established to defeat a government official's qualified immunity when the central issue of the case is one of first impression in the governing circuit and conflicting decisions exist on the issue outside that circuit.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,
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No. 04-12256

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

DANNY M. BENNETT, DANNY L. REID, TAMMY R. BENNETT,
Plaintiffs-Appellees,

versus

DENNIS LEE HENDRIX, Individually and in his Official capacity as Sheriff of Forsyth County, EARL A. SINGLETARY, Individually and in his Official Capacity as Chief Deputy Sheriff of Forsyth County, DAVID W. WATERS, Individually and in his Official Capacity as a Deputy Sheriff of Forsyth County,
Defendants-Appellants,

JAMES L. LOCKHART, Individually and in his Official Capacity as a Deputy Sheriff of Forsyth County, JOHN DOES, 1-10, Individually and in their Official Capacities as Deputy Sheriffs and/or Officers of the Forsyth County Sheriff's Department, et al.,
Defendants.

September 9, 2005, Decided

September 9, 2005, Filed

COUNSEL: For Dennis Lee Hendrix, Earl A. Singletary, Appellants: Phillip E. Friduss, Hall, Booth, Smith & Slover, PC, Atlanta, GA.

For David W. Waters, Appellee: Phillip E. Friduss, Hall, Booth, Smith & Slover, PC, Atlanta, GA.

For Danny M. Bennett, Danny L. Reid, Tammy R. Bennett, Appellees: Eric S. Chofnas, Attorney at Law, Alpharetta, GA.

JUDGES: Before BLACK and WILSON, Circuit Judges, and NANGLE *, District Judge.

OPINION BY: WILSON

OPINION: WILSON, Circuit Judge:

Plaintiffs Danny M. Bennett and Danny L. Reid filed a complaint alleging that Dennis L. Hendrix, former Sheriff of Forsyth County, Georgia and Earl A. Singletary and David W. Waters, deputies who served under Hendrix, violated their civil rights. Plaintiffs alleged that these officers carried out a campaign of police harassment and retaliation after plaintiffs supported a county referendum opposed by the sheriff. After the district court entered an order denying the officers qualified immunity, they brought this appeal. We find no error in the district court's order, and therefore affirm.

I. BACKGROUND

In 1998, Forsyth County, Georgia voters considered a referendum that would have established a county-wide police force and diminished the power of the Forsyth County Sheriff's Department.[1] Most of the Department's powers would have been transferred to the county police, and the Sheriff would have been

under the supervision of county officials. Sheriff Hendrix opposed the referendum. The plaintiffs are local business owners who supported the referendum. Along with other citizens, they formed a committee in support of the referendum and sponsored a debate on the matter.

The referendum was defeated at the polls, but the plaintiffs allege that Hendrix (along with the other defendants, fellow Sheriff's Department officers) engaged in a campaign of retaliation and intimidation against the plaintiffs because of their support of the referendum. The plaintiffs allege that Hendrix formed a "Strike Force" within the Department to carry out this process of intimidation.

Among many other acts of intimidation, they allege the defendants took down license tag numbers of cars at a forum in support of the referendum, surveilled the plaintiffs' homes and businesses, set up roadblocks near their homes, stopped their cars without reason and issued false traffic citations, accessed government databases to obtain confidential information on the plaintiffs, attempted to obtain a warrant for their arrest on trumped-up environmental charges, and mailed flyers to 35,000 homes in Forsyth County calling the plaintiffs the "real criminals," members of a "chain gang," and "the same type of criminals that terrorize Forsyth County."

According to the plaintiffs, most of these events occurred shortly before the 2000 election, and were designed to intimidate the plaintiffs from opposing Hendrix's re-election that year. The plaintiffs assert that the intimidation tactics were successful. Although

the plaintiffs voted and made campaign contributions during the 2000 election cycle, they allege that the defendants' actions chilled them from engaging in further political activities like they did in 1998.

The plaintiffs sued under 42 U.S.C. § 1983 in 2000, alleging violations of the First, Fourth, and Fourteenth Amendments, as well as a conspiracy to violate their civil rights, along with several state tort laws. The district court granted summary judgment to the defendants on most of these claims, but denied summary judgment on the plaintiffs' claim of retaliation in violation of the First Amendment, their § 1983 conspiracy claim, and state law claims against Hendrix, Singletary, and Waters. The defendants moved for summary judgment based on the defense of qualified immunity. The court held that the defendants were not entitled to qualified immunity because they had violated the plaintiffs' constitutional rights, and those rights were clearly established at the time. Accordingly, the district court denied summary judgment.[2]

II. JURISDICTION AND STANDARD OF REVIEW

Although the defendants' appeal is interlocutory, we have jurisdiction to review the district court's decision on qualified immunity pursuant to 28 U.S.C. § 1291 and Mitchell v. Forsyth, 472 U.S. 511, 530, 105 S. Ct. 2806, 2817, 86 L. Ed. 2d 411 (1985). We review *de novo* the district court's decision denying qualified immunity, drawing all factual inferences in the nonmovant's favor. Durruthy v. Pastor, 351 F.3d 1080, 1084 (11th Cir. 2003). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986).

III. DISCUSSION

Our procedure in assessing qualified immunity is well-established. Government officials acting within their discretionary authority are not eligible for qualified immunity from suit when the facts "taken in the light most favorable to the party asserting the injury . . . show the officer's conduct violated a constitutional right" and "the right was clearly established." *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001).

We have already determined, in an earlier appeal in this case, that "it is apparent that the defendants were acting within the scope of their discretionary authority." *See Bennett v. Hendrix*, 77 Fed. Appx. 504 (11th Cir. 2003) (unpublished). The defendants had to establish this fact to be able to claim qualified immunity. Once they satisfied that burden, the burden shifted to the plaintiffs to establish a constitutional violation. *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002).

A. Violation of a Constitutional Right

The precise test for determining whether the defendants' actions violated the plaintiffs' rights against retaliation is an issue of first impression in this Circuit. We first survey the law of other Circuits. To

state a retaliation claim, the commonly accepted formulation requires that a plaintiff must establish first, that his speech or act was constitutionally protected; second, that the defendant's retaliatory conduct adversely affected the protected speech; and third, that there is a causal connection between the retaliatory actions and the adverse effect on speech. *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 499 (4th Cir. 2005); *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002). The only prong at issue here is the second.[3] We must determine the standard for demonstrating an adverse effect on protected speech.

The other Circuits apply an objective test: "a plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter 'a person of ordinary firmness' from the exercise of First Amendment rights." *Constantine*, 411 F.3d at 500; *see also Washington v. County of Rockland*, 373 F.3d 310, 320 (2d Cir. 2004) ("In the context of a First Amendment retaliation claim, we have held that 'only retaliatory conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights constitutes an adverse action.'") (quoting *Dawes v. Walker*, 239 F.3d 489, 493 (2d Cir. 2001)); *Garcia v. City of Trenton*, 348 F.3d 726, 728 (8th Cir. 2003) ("The ordinary-firmness test is well established in the case law . . . ."); *Mitchell v. Horn*, 318 F.3d 523, 530 (3d Cir. 2003) (plaintiff must allege adverse action "sufficient to deter a person of ordinary firmness from exercising his [constitutional] rights") (alteration in original); *Keenan*, 290 F.3d at 258 (ordinary firmness test is the "settled law of other circuits"); *Toolasprashad v. Bureau of Prisons*, 351 U.S. App. D.C. 64, 286 F.3d 576, 585 (D.C. Cir. 2002) ("The

widely accepted standard for assessing whether harassment for exercising the right of free speech is actionable . . . depends on whether the harassment is likely to deter a person of ordinary firmness from that exercise.") (internal quotations and alterations omitted); *Poole v. County of Otero*, 271 F.3d 955, 960 (10th Cir. 2001) ("The alleged injury should be one that would chill a person of ordinary firmness from continuing to engage in that activity.") (internal quotations omitted); *Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999) ("The proper inquiry asks whether an official's acts would chill or silence a person of ordinary firmness from future First Amendment activities.") (internal quotations omitted); *Thaddeus-X v. Blatter*, 175 F.3d 378, 396 (6th Cir. 1999) (*en banc*) ("An adverse action is one that would deter a person of ordinary firmness from the exercise of the right at stake."); *Agosto-de-Feliciano v. Aponte-Roque*, 889 F.2d 1209, 1217 (1st Cir. 1989) (retaliation cause of action is stated "only when the government's actions are sufficiently severe to cause reasonably hardy individuals to compromise their political beliefs and associations"); *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982) (harassment for exercising the right of free speech not actionable if it was "unlikely to deter a person of ordinary firmness from that exercise").

The defendants point to other cases applying a subjective test, under which the plaintiffs would have to show that they were actually chilled in the exercise of their First Amendment rights. *See Curley v. Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001) (plaintiff must show that First Amendment rights were "actually chilled") (quoting *Davis v. Vill. Park II Realty Co.*, 578 F.2d 461, 464 (2d Cir. 1978)).[4] For the reasons that

follow, we join our sister Circuits in adopting an objective test for proving a retaliation claim.

First, although their decisions are not binding on us, we find the fact that every other Circuit has adopted the objective "ordinary firmness" test to be persuasive. Even accepting the defendants' premise that a few scattered cases applying a subjective "actual chill" test amounts to a "circuit split," the vast majority of cases apply the objective test. n5 We agree with the courts that have called the "ordinary firmness" test "well established," *Garcia*, 348 F.3d at 728, "widely accepted," *Toolasprashad*, 286 F.3d at 585, and "settled law," *Keenan*, 290 F.3d at 258.

Second, we are persuaded not only by the number of courts applying the "ordinary firmness" test, but by the reasoning of those decisions as well. An objective standard provides notice to government officials of when their retaliatory actions violate a plaintiff's First Amendment rights. In contrast, "a subjective standard would expose public officials to liability in some cases, but not in others, for the very same conduct, depending upon the plaintiff's will to fight." *Constantine*, 411 F.3d at 500. "It would be unjust to allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity. . . ." *Mendocino Envtl. Ctr.*, 192 F.3d at 1300. There is no reason to "reward" government officials for picking on unusually hardy speakers. At the same time, we recognize that government officials should not be liable when the plaintiff is unreasonably weak-willed or suffers only a "*de minimis* inconvenience to her exercise of First Amendment rights." *Constantine*, 411 F.3d at 500

(internal quotation omitted); *see also* Bart, 677 F.2d at 625 ("It would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise . . . ."). The "ordinary firmness" test is therefore protective of the interests of both government officials and plaintiffs alleging retaliation.

The defendants contend that "something more than the mere retaliatory act is necessary to give rise to an actionable claim." *Appellants' Brief* at 12. They are correct, but as we have explained, the "something more" is an adverse affect, and "adverse effect" depends on context. Specifically, private citizens must establish that the retaliatory acts would deter a person of ordinary firmness from exercising his or her First Amendment rights. The defendants' reliance on retaliation cases in the public employment context is misplaced, because different interests are at stake there. In the employment context, the required adverse action in a retaliation claim is an "adverse employment action." *See Stavropoulos v. Firestone*, 361 F.3d 610, 616 (11th Cir. 2004), *cert. denied*, 161 L. Ed. 2d 727, 125 S. Ct. 1850 (2005). Plainly, private citizens cannot suffer adverse employment actions at the hands of public officials who are not their employers. As the Fourth Circuit explained,

Determining whether a plaintiff's First Amendment rights were adversely affected by retaliatory conduct is a fact intensive inquiry that focuses on the status of the speaker, the status of the retaliator, the relationship between the speaker and the retaliator, and the nature of the retaliatory acts. *See Thaddeus-X v. Blatter*, 175

F.3d 378, 398 (6th Cir. 1999) ("The definition of adverse action is not static across contexts."). For example, in the public employment context, the speaker is the employee and the retaliator is the public employer. The employment relationship between the speaker and retaliator creates competing interests between "the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees."

Suarez Corp. Indus. v. McGraw, 202 F.3d 676, 686 (4th Cir. 2002) (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734-35, 20 L. Ed. 2d 811 (1968)) (alterations in original). As the Fifth Circuit pointed out, "in the employment context, this court's requirement of an adverse employment action serves the purpose of weeding out minor instances of retaliation." *Keenan*, 290 F.3d at 258 n.4. In other words, minor instances of retaliation would not chill a person of ordinary firmness because they did not even amount to an adverse employment action.

The balance of interests is different when the plaintiff is a private citizen, and those interests require at least as much protection against retaliation for a private citizen as they would for a public employee. n6 *See Thaddeus-X*, 175 F.3d at 398 ("Public employees . . . may be required to tolerate more than average citizens, before an action taken against them is considered adverse."); *see also Keenan*, 290 F.3d at 258 (noting that "this case does not involve an employment or other contractual relationship between the plaintiffs and the governmental officials" and instead concerns "an

ordinary citizen"); *Naucke v. City of Park Hills*, 284 F.3d 923, 927-28 (8th Cir. 2002) (applying "ordinary firmness" test to private citizen's retaliation suit); *Poole*, 271 F.3d at 960 (same); *Suarez Corp.*, 202 F.3d at 686-87 (distinguishing between public employee and private citizen plaintiffs).

In sum, language from the cases, including our decision in *Stavropoulos*, requiring an adverse employment action in order for a public employee to state a retaliation claim does not necessitate that a private citizen plaintiff plead more than that the defendant's retaliatory acts are such as would chill a person of ordinary firmness. As we have stated, for private citizen plaintiffs, the objective test allows for a "weeding out" function when the injuries complained of are trivial or amount to no more than *de minimis* inconvenience in the exercise of First Amendment rights.

The defendants next assert that the "ordinary firmness" test allows plaintiffs to state a claim even when they have not suffered an injury sufficient to give them standing to sue. We disagree. The plaintiffs' claim depends not on the denial of a constitutional right, but on the harassment they received for exercising their rights. "The reason why such retaliation offends the Constitution is that it threatens to inhibit exercise of the protected right." *Thaddeus-X*, 175 F.3d at 394 n.9 (quotation omitted). "For Article III standing purposes, then, the 'plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.' As long as the injury is 'distinct and palpable' rather than abstract, conjectural, or hypothetical, it is sufficient to

confer standing." *Id.* at 394 (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 3324, 82 L. Ed. 2d 556 (1984)).

The defendants' reliance on *Laird v. Tatum*, 408 U.S. 1, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972), is misplaced. In that case, the plaintiffs alleged a chilling effect based on the mere existence of the government's alleged program of surveillance of citizens. *Id.* at 2, 92 S. Ct. at 2320. The plaintiffs "freely admit[ted] that they complain of no specific action of the Army against them." *Id.* at 9, 92 S. Ct. at 2323. The Supreme Court held that this alleged injury was insufficient to confer standing. *Id.* at 13-14, 92 S. Ct. at 2325-26.

However, the *Laird* Court noted that, "in recent years this Court has found in a number of cases that constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *Id.* at 11, 92 S. Ct. at 2324 (collecting cases). Moreover, "the decisions in these cases fully recognize that governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights." *Id.* at 12-13, 92 S. Ct. at 2325. The standard established in *Laird* is that "allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Id.* at 13-14, 92 S. Ct. 2325-26. The standard we adopt today is consistent with *Laird*. The objective "ordinary firmness" test requires plaintiffs to allege that the retaliatory acts of the defendants adversely affected them, which is an injury sufficiently adverse to give rise to Article III standing. *See*

Thaddeus-X, 175 F.3d at 394.

As a final reason for approving of the objective standard, we note that it is consistent with statements in our own cases, even though we have not explicitly adopted the "ordinary firmness" test. In *Cate v. Oldham*, 707 F.2d 1176 (11th Cir. 1983), we enjoined a malicious prosecution action filed by state officials in retaliation against a citizen's lawsuit against those officials. *Id.* at 1190. We noted that "petitioner-appellant alleges more than that his freedom to exercise his right to petition will be chilled in the future. He alleges current deprivation, in the form of penalization for having exercised his right to petition in the past." *Id.* at 1188. We went on to state, "this does not mean, however, that only if a plaintiff can prove actual, current chill can he prove irreparable injury. On the contrary, direct retaliation by the state for having exercised First Amendment freedoms in the past is particularly proscribed by the First Amendment." *Id.* at 1189. Thus, we did not focus on the plaintiff's subjective, actual chilling. Instead, we objectively assessed the defendants' actions and declared that an actual chill is not necessary to state a First Amendment violation: "The *source* of that chill . . . provides the critical irreparable injury to those citizens, regardless of whether actual chill is proved." *Id.*; *see also Holloman v. Harland*, 370 F.3d 1252, 1268-69 (verbal censure from school official for student's silent protest during recitation of Pledge of Allegiance was a punishment intended "to dissuade [student] from exercising a constitutional right" and "cannot help but have a tremendous chilling effect on the exercise of First Amendment rights").

For all of the foregoing reasons, today we expressly adopt the following standard: A plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter a person of ordinary firmness from the exercise of First Amendment rights.

We now apply this standard to the plaintiffs' allegations, and readily conclude that the plaintiffs have alleged facts that a jury could find would deter a person of ordinary firmness from the exercise of First Amendment rights. In Judge Posner's words, "the effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their constitutional rights it need not be great in order to be actionable." *Bart*, 677 F.2d at 625.

The alleged retaliatory acts complained of here include a prolonged and organized campaign of harassment by local police officers. Taken in the light most favorable to the plaintiffs, the record is replete with instances where the defendants followed, pulled over, cited, intimidated, or otherwise harassed the plaintiffs. The defendants allegedly accessed confidential government databases containing information on the plaintiffs, attempted to obtain arrest warrants against the plaintiffs without probable cause, and produced and mailed to Forsyth County residents flyers depicting the plaintiffs as criminals terrorizing the county.

Other courts applying the "ordinary firmness" test have concluded that similar or less harassing acts constitute an adverse effect. *See Garcia*, 348 F.3d at 729 (the retaliatory issuance of parking tickets totaling $ 35 created a jury issue because the defendant "engaged the punitive machinery of government in order to

punish Ms. Garcia for her speaking out"); *Keenan*, 290 F.3d at 259 (one plaintiff stated a retaliation claim that would chill a person of ordinary firmness with allegations that officers stopped his car and detained him for an unreasonable time, "allegedly with their guns drawn during part of the traffic stop, and ultimately issued only a minor traffic citation that was later dismissed"); *Bloch v. Ribar*, 156 F.3d 673, 680-81 (6th Cir. 1998) (in response to plaintiff's criticism, sheriff publicly released confidential and humiliating details of plaintiff's rape; such act was sufficiently adverse to chill a person of ordinary firmness); *Bart*, 677 F.2d at 624-25 ("campaign of petty harassments" against the plaintiff including "holding her up to ridicule for bringing a birthday cake to the office" stated a cause of action for retaliation). Likewise, we held in *Cate* that a civil malicious prosecution suit brought by public officials could be sufficiently retaliatory to chill the plaintiffs' exercise of First Amendment rights. *Cate*, 707 F.2d at 1189.

Additionally, the plaintiffs testified that they were, in fact, actually chilled in the exercise of their rights because they did not participate in the 2000 election to the degree they would have but for the defendants' alleged actions. We note that "the question is not whether the plaintiff herself was deterred, though how plaintiff acted might be evidence of what a reasonable person would have done." *Garcia*, 348 F.3d at 729; *see also Constantine*, 411 F.3d at 500 ("While the plaintiff's actual response to the retaliatory conduct provides some evidence of the tendency of that conduct to chill First Amendment activity, it is not dispositive."). In sum, we conclude that the acts alleged here, if true, are sufficiently adverse that a jury could find they would

chill a person of ordinary firmness from exercising his or her First Amendment rights.

B. Clearly Established Law

The final step in the qualified immunity inquiry is determining whether the law was clearly established so as to put the defendants on notice that their behavior violated the plaintiffs' rights. A right is clearly established if, in light of already-existing law, the unlawfulness of the conduct is "apparent," *see Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987), and if a constitutional rule applies with "obvious clarity" to give an official "fair warning" that violating that right is actionable. *Vinyard*, 311 F.3d at 1350-52. We conclude that the law was clearly established at the time of the defendants' alleged actions that retaliation against private citizens for exercising their First Amendment rights was actionable.

This Court and the Supreme Court have long held that state officials may not retaliate against private citizens because of the exercise of their First Amendment rights. *See Cate*, 707 F.2d at 1186 (punishment for exercise of First Amendment rights violates First Amendment); *see also City of Houston v. Hill*, 482 U.S. 451, 462-63, 107 S. Ct. 2502, 2510, 96 L. Ed. 2d 398 (1987) ("The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."); *see also Leslie v. Ingram*, 786 F.2d 1533, 1537 (11th Cir. 1986) ("An intentional and wrongful retaliation for the assertion of a constitutionally protected right is a substantive civil rights violation which may be

prosecuted in a federal court pursuant to 42 U.S.C. § 1983. . . ."), *abrogated on other grounds by Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989); *Ga. Ass'n of Educators v. Gwinnett County Sch. Dist.*, 856 F.2d 142, 145 (11th Cir. 1988) ("The Government may not retaliate against individuals or associations for their exercise of First Amendment rights 'by imposing sanctions for the expression of particular views it opposes.'") (quoting *Smith v. Ark. State Highway Employees*, 441 U.S. 463, 464, 99 S. Ct. 1826, 1827-28, 60 L. Ed. 2d 360 (1979)).

Because this Court has held since at least 1988 that it is "settled law" that the government may not retaliate against citizens for the exercise of First Amendment rights, *Ga. Ass'n of Educators*, 856 F.2d at 145, we hold that the defendants were on notice and had "fair warning" that retaliating against the plaintiffs for their support of the 1998 referendum would violate the plaintiffs' constitutional rights and, if the plaintiffs' allegations are true, would lead to liability under § 1983.

IV. CONCLUSION

For the reasons stated above, we conclude that, taking the facts in the light most favorable to the plaintiffs, the defendants' "conduct violated a constitutional right" and that "the right was clearly established." *Saucier*, 533 U.S. at 201, 121 S. Ct. at 2156. Accordingly, we affirm the order of the district court denying summary judgment and denying the defendants qualified immunity from suit.

AFFIRMED.

* Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri, sitting by designation.

n1 We present the facts in the light most favorable to the plaintiffs, the party opposing summary judgment. *Young v. City of Palm Bay*, 358 F.3d 859, 860 (11th Cir. 2004).

n2 The court granted summary judgment for the defendants as to the claims brought by plaintiff Tammy Bennett, and she is not a party to this appeal. Likewise, the district court granted summary judgment on the plaintiffs' claims against the additional defendants. Thus, the only issue before us is the entitlement of Hendrix, Singletary, and Waters to qualified immunity.

n3 In the district court, the defendants conceded the first prong, that the plaintiffs' support for the 1998 referendum was protected speech. In addition, the defendants have never pointed to any indication in the record that they would have undertaken their allegedly retaliatory actions even absent the plaintiffs' speech. Accordingly, we agree with the district court that the plaintiffs have shown that there exists at least a genuine issue of material fact as to the third (causation) prong.

n4 The defendants also cite *Sullivan v. Carrick*, 888 F.2d 1 (1st Cir. 1989), as adopting an "actual chill" standard. However, the plaintiff there failed to allege any adverse action, and thus could not show sufficient injury to create standing. *Id.* at 4. Moreover, the court noted that the proper standard was whether the plaintiff's "speech was in fact chilled *or intimidated*." *Id.*

(emphasis added). Therefore, we do not read *Sullivan* to adopt unequivocally a subjective test.

n5 We note that cases from the Second Circuit appear to take contradictory positions. *Compare Washington v. County of Rockland*, 373 F.3d 310, 320 (2d Cir. 2004) (objective standard) *with Curley v. Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001) (subjective standard). We leave it to that Court to settle this disparity.

n6 We note that several courts have applied the "ordinary firmness" test even in the prison context. It follows that a private citizen, not subject to the expected deprivations of prison life, deserves at least as much protection from retaliation. *See Mitchell*, 318 F.3d at 530; *Toolasprashad*, 286 F.3d at 585; *Thaddeus-X*, 175 F.3d at 398. We have held that "to state a First Amendment claim for retaliation, a prisoner need not allege violation of a separate and distinct constitutional right. . . . The gist of a retaliation claim is that a prisoner is penalized for exercising the right of free speech." *Farrow v. West*, 320 F.3d 1235, 1248 (11th Cir. 2003) (alterations omitted) (quoting *Thomas v. Evans*, 880 F.2d 1235, 1242 (11th Cir. 1989). For example, a prisoner can state a claim of retaliatory transfer even though he does not have a constitutional right not to be transferred. *Bridges v. Russell*, 757 F.2d 1155, 1157 (11th Cir. 1985). Thus, nothing in our prisoner retaliation cases is inconsistent with adopting an "ordinary firmness" test for private citizens.

CIVIL ACTION FILE NO. 1 :00-C V-2520-T W T

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

DANNY M. BENNETT, et al., Plaintiffs,

v.

DENNIS LEE HENDRIX, Individually and in his official capacity as Sheriff of Forsyth County, et al., Defendants.

Filed 4/13/2004

ORDER

This is a civil rights action brought under 42 U.S.C. §§ 1983 and 1985(3). It is before the Court pursuant to an order from the Court of Appeals for the Eleventh Circuit vacating this Court's order deferring a ruling on qualified immunity until trial. For the reasons set forth below, this Court holds that the Defendants are not entitled to qualified immunity.

I. BACKGROUND

The Plaintiffs supported a referendum to establish a county-wide police force in Forsyth County, Georgia. They allege that the former Sheriff of Forsyth County, who opposed the referendum, retaliated against them, and deprived them of their constitutional rights through a campaign of illegal surveillance, harassment, and defamation. Plaintiff Danny L. Reid is a grading contractor doing business though his company, Reid &

Reid, LLP, in Gumming, Georgia. Plaintiff Danny M. Bennett is an engineer and a general contractor. Bennett's company is Georgia North Contracting, Inc., operating out of Gainesville, Georgia. Plaintiff Tammy R. Bennett is Danny Bennett's wife. Defendant Dennis Lee Hendrix was Sheriff of Forsyth County, Georgia during the time of the events at issue. Defendants Earl A. Singletary and David W. Waters served as Chief Deputy Sheriff and Deputy Sheriff, respectively, under Sheriff Hendrix.

In 1998, the Plaintiffs[1], along with other Forsyth County residents, supported a referendum to create a county-wide police force in Forsyth County. The Plaintiffs and others formed a committee to help advance the referendum and support the establishment of a county police force. The committee met all the requirements mandated by law for such committees as set out in O.C.G.A. § 2I-5-30. The creation of a county police force would have effectively transferred the law enforcement powers of the sheriff to the county police. The Plaintiffs allege that Sheriff Hendrix adamantly opposed the referendum effort. They allege that the Sheriff and his deputies engaged in conduct that was meant to threaten and intimidate public discourse on the subject. For example, the Plaintiffs allege that Sheriff Hendrix ordered his deputies to patrol the parking lot where a public debate on the issue was held and to write down the automobile tag numbers of the citizens who attended the debate. The referendum to establish a county police force was defeated.

The Plaintiffs allege that Sheriff Hendrix and his department retaliated against them because they took a public stance in favor of the referendum. The actions

allegedly taken by Sheriff Hendrix include ordering deputies to follow the Plaintiffs for surveillance purposes; ordering deputies to regularly "stake out" Plaintiff Bennett's residence; on two occasions stopping Plaintiff Tammy Bennett near her residence without probable cause and issuing false and pretextual traffic citations; unlawfully accessing county and state records to obtain confidential information regarding the Plaintiffs to be used for harassment; maliciously using such information to defame Plaintiffs Reid and Bennett; ordering deputies to harass, intimidate and interfere with Plaintiffs Reid and Bennett in the lawful pursuit of their business interests; and attempting to obtain a warrant for the arrest of Plaintiff Reid on false and pretextual grounds. Sheriff Hendrix allegedly announced the formation of a "Strike Force" at a staff meeting on February 9, 1999. The purpose of this special force was to carry out the intimidation campaign.

In an order dated June 21, 2001, this Court dismissed the Plaintiffs' claims based upon the Fourth Amendment, the Due Process Clause of the Fourteenth Amendment, and section 1983 supervisory liability. The Court also dismissed several other state law claims against Defendants Hendrix, Singletary, Waters, and John Does (1-10). The Defendants subsequently moved for summary judgment on the remaining claims for violations of the First Amendment and section 1983 conspiracy liability. In an order dated February l, 2002, this Court granted summary judgment as to the claims based on retaliatory speech (the campaign fliers) and equal protection, and denied summary judgment as to the claims based on retaliatory conduct against the Plaintiffs. Due to inadequate briefing, the Court

deferred ruling on the Defendants' qualified immunity defense until after the presentation of evidence at trial.

Defendants Hendrix, Singletary, and Waters filed an interlocutory appeal challenging this Court's decision to defer determination of qualified immunity until trial. On July 25, 2003, the Court of Appeals for the Eleventh Circuit vacated the order deferring ruling on qualified immunity and remanded. The Court of Appeals found the facts in the record sufficient to determine that the Defendants had met their initial burden to prove that they were acting within the scope of their discretionary authority. The Court of Appeals remanded for this Court to rule on qualified immunity before trial. The mandate was issued on September 3, 2003. Rebriefing on the issue was completed on December 18, 2003.

II. DISCUSSION

This action is before the Court for a pretrial ruling on whether the Defendants Hendrix, Singletary, and Waters are entitled to the defense of qualified immunity. "Qualified immunity offers complete protection for government officials sued in their individual capacities if their conduct `does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Vinyard v. Wilson, 311 F.3d 1340, 1346 (11th Cir. 2002) (quoting Harlow v. Fitzgerald 457 U.S. 800, 818 (1982)). The purpose underlying qualified immunity is to allow government officials to carry out their duties without the fear of personal liability or harassing litigation. Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002). "[A]ll but the plainly incompetent or one who is knowingly violating the federal law" find protection in qualified

immunity. Id.

The Eleventh Circuit has adopted a two-pronged analysis to determine whether a public official is entitled to qualified immunity. See, e.g., Vinyard, 311 F.3 d at 1346-47; Lee, 284 F.3d at 1194; Rich v. Dollar, 841 F.2d 1558, 1563-64 (11th Cir. 1988). First, the official must show that he acted within the scope of his discretionary authority when the challenged conduct occurred. Vinyard 311 F.3d at 1346. In this case, the Court of Appeals has held that all of the challenged actions were representative of standard law enforcement practices, and "it is apparent that the defendants were acting within the scope of their discretionary authority." Bennett v. Hendrix, No. 02-11031 (11th Cir. July 25, 2003). Thus, the Defendants have met their preliminary burden.

Once the defendant official satisfies this initial requirement, the burden shifts to the plaintiff to show that the challenged actions violated the plaintiff's federal rights under clearly established law. This is a two step process. The court must first inquire whether the plaintiff's allegations, if true, establish a constitutional violation. Hope v_. Pelzer, 536 U.S. 730, 736-42 (2002); Saucier v. Katz, 533 U.S. 194, 201 (2001). If a constitutional right has been violated, "the next, sequential step is to ask whether the right was clearly established" at the time of the challenged action. Saucier, 533 U.S. at 201; Lee, 284 F.3d at 1194.

A. Constitutional Violation

The Defendants use the bulk of thei. additional briefing to address the first part of the Hope inquiry - whether

their alleged actions violated the Plaintiffs' constitutional rights. This effort is misplaced as this Court has already held that the Plaintiffs' claims of First Amendment violations and conspiracy survive summary judgment. See Bennett v. Hendrix, No. 1:00-CV-2520-TWT (Order of Feb. 1, 2002 [Doc. 17b], at 18). To determine whether the Defendants' retaliation claims survived summary judgment, this Court applied the three-part test in Suarez Cord. Industries v. McGraw, 202 F.3d 676, 685 (4th Cir. 2000). Viewing the evidence presented in the light most favorable to the Plaintiffs, this Court held that: (1) the Plaintiffs' speech enjoyed constitutional protection; (2) the Defendants' alleged retaliatory actions adversely affected the Plaintiffs' constitutionally protected speech; and (3) there is a genuine issue of material fact as to the causal connection between the protected conduct and the adverse action. Bennett v. Hendrix, No. 1 :00-CV-2520-TWT (Order of Feb. 1, 2002 [Doc. 176], at 14-18). This Court also held that the Plaintiffs sufficiently established a jury question as to their section 1983 conspiracy claims. Id. at 18. "A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry." Saucier, 533 U.S. at 201. This initial inquiry requires the Court to employ the same standard of review used in summary judgment determinations - to view the evidence and any inferences that may be drawn in the light most favorable to the nonmovant. See, e.g., Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970). Thus, a holding that the Plaintiffs' constitutional claims survive summary judgment necessarily means

that the initial inquiry must be answered in the affirmative: taken in the light most favorable to the Plaintiffs, the facts alleged indeed show that the officers' conduct violated a constitutional right. As these holdings represent the law of the case, they shall not be reexamined in deciding whether Defendants Hendrix, Singletary, and Waters are entitled to the defense of qualified immunity. Accordingly, the only task remaining for this Court is to determine whether the second part of the Hope test is met - whether the relevant federal law was clearly established when the events at bar occurred.

B. "Clearly Established" Law

The doctrine of qualified immunity originated in Harlow v. Fitzgerald, 457 U.S. 800 (1982), where the Supreme Court held that immunity will be denied only where the official's conduct violated a clearly established federal right. Applying Harlow, the Eleventh Circuit held that such rights are clearly established when they have been previously developed in "such a concrete and factually defined context to make it obvious to all reasonable government actors, in the [official's] place that `what he is doing' violates federal law."' Lassiter v. Alabama A&M University, Bd. of Trustees, 28 F.3d 1146, 1149 (11th Cir. 1994). Until recently, in the Eleventh Circuit, the law was that a plaintiff must show that the federal right in question has been defined by prior cases with "concrete circumstances" and "materially similar" facts. Marsh v. Butler County. Ala., 268 F.3d 1014 (11th Cir. 2001) (en banc); Lassiter, 28 F.3d at 1150.[2] This stringent requirement was satisfied only in the rarest of circumstances, making qualified immunity a "nearly

insuperable obstacle" in the Eleventh Circuit. Omar ex rel. Cannon v. Lindsey, 334 F.3d 124b, 1249 (11th Cir. 2003).

In Hope v. Pelzer, 536 U.S. 730 (2402), the Supreme Court rejected the "materially similar" facts test developed by the Eleventh Circuit to determine whether a right is clearly established. The Court relied on its earlier decision in United States v. Lanier, S20 U.S. 259 (1997), which stated:

[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful.

Id. at 271. The Court described the "materially similar" facts test as a "rigid gloss on the qualified immunity standard [that] is not consistent with our cases." Hope, 536 U.S. at 739. Rejecting this requirement, the Court restated the standard for determining whether a right is clearly established:

Our opinion in Lanier . . . makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances. indeed in Lanier, we expressly rejected a requirement that previous cases be "fundamentally similar" . . . Accordingly, pursuant to Lanier, the salient question that the Court of Appeals ought to have asked is whether the state of the law [at the time of the challenged action] gave respondents fair warning that

their alleged treatment of Hope was unconstitutional.

Id. at 741. Thus, the Supreme Court rejected the Eleventh Circuit's "materially similar" facts test in favor of a "fair warning" test.

In the wake of Hope, the Eleventh Circuit has given texture to the requirement that an official have fair warning that his action violates a claimant's rights. In Vinyard v. Wilson, 311 F.3d 1340, 1349-55 (11th Cir. 2002), the Court of Appeals identified three categories of cases in which the unlawfulness of an official's conduct is deemed clearly established: (1) where specific words in the federal statute or constitutional provision render the law applicable to the challenged conduct; (2) where judicial decisions clearly apply to a wide variety of factual circumstances; and (3) where precedents involve materially similar facts. Id. at 1350-51. As the first two categories suggest, a plaintiff may overcome the qualified immunity defense without relying on fact-specific case law when a preexisting constitutional rule applies with "obvious clarity" to the conduct in question. Id. at 1352.

The Plaintiffs present no case law with "materially similar" facts declaring the Defendants' specific conduct violative of the Plaintiffs' constitutional rights. Nevertheless, preexisting constitutional law established by the Supreme Court and the Eleventh Circuit apply with "obvious clarity" to the Defendants' alleged actions. The Supreme Court has long held that actions by the police which interfere with the free exercise of speech protected by the First Amendment are subject to suit pursuant to section 1983. City of Houston, Tex. v. Hill, 482 U.S. 451, 461 (1987); Hague v.

Committee for Indus. Organization, 307 U.S. 496,519 (1939). In Terminiello v. City of Chicago, 337 U.S. 1 (1949), the Court underscored the importance of protecting political speech against coercion by public officials:

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view.

Id. at 4 (citations omitted). The Eleventh Circuit has echoed the Supreme Court's concern that citizens be protected from retaliatory punishment for speech. In Gate v. Oldham, 707 F.2d 1176 (11th Cir. 1983), the Court of Appeals stated:

[T]he test for determining a violation of First Amendment rights has never been whether or not the speaker or petitioner was successful in delivering his message before he was arrested or otherwise penalized for speaking or petitioning. What is relevant is whether any burden on First Amendment freedoms, either in the form of a prior restraint or a sanction imposed to

prohibit or to punish exercise of First Amendment rights is justified by sufficiently compelling state interests. Although prior restraints are especially suspect under the First Amendment, subsequent punishments too can present an infringement of First Amendment rights.

Id. at 1186 (citations omitted). To protect against such conduct, the Eleventh Circuit has held that police retaliation against a private citizen for the exercise of a constitutional right creates an action pursuant to section 1983. Leslie v. Ingram, 786 F.2d 1533, 1537 (11th Cir. 1986) ("An intentional and wrongful retaliation for the assertion of a constitutionally protected right is a substantive civil rights violation which may be prosecuted in a federal court pursuant to 42 U.S.C. § 1983."); Wilson v. Thompson, 593 F.2d 1375 (5th Cir. 1979).[3] Indeed, the Eleventh Circuit has stated that it is "settled law" that state officials may not retaliate against individuals for the exercise of First Amendment rights. Georgia Assn of Educators v. Gwinnett County School Dist., 856 F.2d 142, 145 (11th Cir. 1988).

Pursuant to Vinyard, if these broad statements of settled law clearly proscribe the challenged acts as unconstitutional, the officials committing the acts would have fair warning that the acts were unlawful and, thus, are not entitled to qualified immunity. Vinyard, 311 F.3d at 1351. The actions allegedly taken by the Defendants include ordering deputies to follow the Plaintiffs for surveillance purposes; ordering deputies to regularly "stake out" Plaintiff Bennett's residence; unlawfully accessing county and state records to obtain confidential information regarding the Plaintiffs to be

used for harassment; ordering deputies to harass, intimidate and interfere with Plaintiffs Reid and Bennett in the lawful pursuit of their business interests; and attempting to obtain a warrant for the arrest of Plaintiff Reid on false and pretextual grounds. The Plaintiffs have put forth evidence which indicates that they were targeted for this retaliation because of their support of the 1998 referendum. The testimony of Mark Thomas, a former major with the Department and a member of Sheriff Hendrix's command staff, suggests that Hendrix targeted the Plaintiffs for surveillance. (Thomas Dep. at 38-39, 45, 103). The testimony of William Miller, a former lieutenant during Hendrix's term, indicates that Hendrix stated that he would require Miller to investigate 50 to 75 residents who might be opposed to Hendrix's re-election. (Miller Aff. Pars. 7-13).[4] Miller also stated that there was no indication that any of these residents were suspected of any criminal activity or other legitimate basis for such investigations. Id. Thus, the evidence presented, viewed in the light most favorable to the Plaintiffs, indicates that the Defendants ordered or conducted surveillance and harassment of the Plaintiffs in retaliation for the Plaintiffs' public stance in favor of the 1998 referendum. The Plaintiffs' political speech falls squarely within the ambit of the First Amendment. The Defendants' harassment and surveillance of the Plaintiffs fall squarely within the retaliatory conduct clearly proscribed by the settled case law of the Supreme Court and the Eleventh Circuit. Terminiello, 337 U.S. at 4; Georgia Assn of Educators, 856 F. 2d at 145; Leslie, 786 F.2d at 1537; Cate, 747 F.2d at 1186. Indeed, it is difficult, if not impossible, to fathom that a reasonable officer in the Defendants' position would not recognize that

retaliatory surveillance and harassment of political opponents under color of law was a violation of their constitutional rights. As settled case law applied with obvious clarity to the Defendants' alleged retaliatory acts, the Defendants had fair warning that these acts violated the Plaintiffs' constitutional rights. Thus, the Defendant officers' invocation of qualified immunity is improper, and summary judgment on the

Plaintiffs' claims of retaliation based on the Defendants' immunity from suit would be inappropriate.

III. CONCLUSION

For the reasons set forth above, the Defendants' Motion for Summary Judgment on qualified immunity is DENIED.

SO ORDERED, this 12 day of April, 2004.

THOMAS W. THRASH, JR.
United States District Judge

Footnotes

n1Unless otherwise noted, the Court will refer to Danny M. Bennett and Danny L. Reid as the "Plaintiffs."

n2The Eleventh Circuit also made qualified immunity unavailable in the "slender category" of cases in which the official's conduct was so obviously at the core of what the federal right prohibits that the unlawfulness of the conduct would be unquestionably apparent to any official. Smith v. Mattox, 127 F.3d 1416, 1419 (11th Cir.

1997).

n3In Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions the former Fifth Circuit rendered prior to the close of business on September 30, 1981.

n4Miller, unwilling to accept a transfer from the Criminal Investigation Division to Internal Affairs to conduct this illegitimate investigation under Defendant Waters, resigned from the Department on February 12, 1999. (Miller Aff. Pars. 7-13).

FILED 11/7/2005

No. 04-12256

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

DANNY M. BENNETT, DANNY L. REID, TAMMY R. BENNETT,
Plaintiffs-Appellees,

versus

DENNIS LEE HENDRIX, Individually and in his Official capacity as Sheriff of Forsyth County, EARL A. SINGLETARY, Individually and in his Official Capacity as Chief Deputy Sheriff of Forsyth County, DAVID W. WATERS, Individually and in his Official Capacity as a Deputy Sheriff of Forsyth County,
Defendants-Appellants,

JAMES L. LOCKHART, Individually and in his Official Capacity as a Deputy Sheriff of Forsyth County, JOHN DOES, 1-10, Individually and in their Official Capacities as Deputy Sheriffs and/or Officers of the Forsyth County Sheriff's Department, et al.,
Defendants.

September 9, 2005, Decided

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

JUDGES: Before BLACK and WILSON, Circuit Judges, and NANGLE *, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court, having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are Denied.

ENTERED FOR THE COURT,
United States Circuit Judge

Footnote

* Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri, sitting by designation.

No. 05-989

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

DENNIS LEE HENDRIX, EARL A. SINGLETARY and DAVID W. WATERS,

Petitioners,

v.

DANNY M. BENNETT and DANNY L. REID,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit erred in adopting the objective "ordinary firmness" test as the standard for evaluating the "adverse action" element of First Amendment retaliation claims.

2. Whether the law was "clearly established" where the Eleventh Circuit had long applied an objective test in First Amendment retaliation cases, but had not yet affixed the "ordinary firmness" label to that test.

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INTRODUCTION

The U.S. Court of Appeals for the Eleventh Circuit adopted the "ordinary firmness" test to determine whether governmental action is severe enough to constitute "adverse action" for purposes of a First Amendment retaliation claim. Under this test, "adverse action" is present where retaliatory conduct is severe enough that it would likely deter a person of "ordinary firmness" from engaging in protected activity. The Eleventh Circuit's ruling follows similar decisions in virtually every other Circuit, which have already adopted the "ordinary firmness" test. It is also consistent with earlier Eleventh Circuit decisions in which that Court applied an objective test without attaching the "ordinary firmness" label. As the Eleventh Circuit observed:

> [T]he courts . . . have called the "ordinary firmness" test "well established," *Garcia*, 348 F.3d at 728, "widely accepted," *Tbolasprashad*, 286 F.3d at 585, and "settled law," *Keenan*, 290 F.3d at 258.[1]

Faced with the widespread acceptance of the "ordinary firmness" test, Petitioners attempt to conjure a "circuit split" where none exists. They argue that the Eleventh Circuit should have applied a subjective test that requires a plaintiff to prove an "actual chilling" of his First Amendment rights, and suggest that the Circuits are riven over the "subjective" versus "objective" dichotomy. In actuality, at most, there is uncertainty in the Second Circuit as to whether it will apply the "ordinary firmness" test to all First Amendment retaliation claims, or only to retaliation claims by prisoners and public employees.[2] As the Eleventh Circuit noted, however, that is a nuance to be resolved by the evolving case law of that Circuit.[3]

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[1] Pet. App. 8a.

[2] *See*, Section I, D, *infra*.

[3] *See*, Pet. App. 19a, n. 5, where the Eleventh Circuit observed:

> We note that cases from the Second Circuit appear to take contradictory positions. *Compare Washington v. County of Rockland*, 373 F.3d 310, 320 (2nd Cir. 2004) (objective standard)

(Continued on following page)

Moreover, the reasons that the "ordinary firmness" test has become so widely accepted are that it is: (1) consistent with this Court's precedents, (2) rooted in sound policy factors, such as the need to ensure that guilty officials do not escape punishment, and (3) susceptible to judicial application in a consistent manner. Therefore, despite Petitioners' pleas, this Court does not need to intervene to stem the salutary effects of the "ordinary firmness" test on First Amendment jurisprudence. There is already virtual unanimity among the Circuits on this issue.

Petitioners also argue that the law was not "clearly established" when they retaliated against Respondents, and therefore they are entitled to qualified immunity. For qualified immunity purposes, the law is "clearly established" if, in light of preexisting law, it would be apparent to a reasonable officer in the defendant's circumstances that his conduct was unlawful. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Petitioners contend that the law regarding the "adverse action" element of First Amendment retaliation claims could not have been "clearly established" because the Eleventh Circuit had not yet adopted the "ordinary firmness" label, even though it had long applied an objective standard to this issue.[4] *Holloman v. Harland*, 370 F.3d 1252, 1278 (11th Cir. 2004); *Ga. Assn. of Educators v. Gwinnett Co. School Dist.*, 856 F.2d 142 (11th Cir. 1988); *Cate v. Oldham*, 707 F.2d 1176, 1186 (11th Cir. 1983). However, this argument is dispelled by the District Court's factual findings regarding Petitioners' retaliation. On remand from the first interlocutory appeal on qualified immunity in this case, the District Court wrote:[5]

> The actions allegedly taken by the Defendants include ordering deputies to follow the Plaintiffs

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with Curley v. Village of Suffern, 268 F.3d 65, 73 (2nd Cir. 2001) (subjective standard). We leave it to that Court to settle this disparity.

[4] *See*, further discussion of 11th Circuit cases in Respondents' 11th Cir. Brief at 37-41.

[5] Pet. App. 30a-32a.

> for surveillance purposes; ordering deputies to regularly "stake out" Plaintiff Bennett's residence; unlawfully accessing county and state records to obtain confidential information regarding the Plaintiffs to be used for harassment; ordering deputies to harass, intimidate and interfere with Plaintiffs Reid and Bennett in the lawful pursuit of their business interests; and attempting to obtain a warrant for the arrest of Plaintiff Reid on false and pretextual grounds . . . The testimony of Mark Thomas, a former major with the Department and a member of Sheriff Hendrix's command staff, suggests that Hendrix targeted the Plaintiffs for surveillance. (Thomas Dep. at 38-39, 45, 103). The testimony of William Miller, a former lieutenant during Hendrix's term, indicates that Hendrix stated that he would require Miller to investigate 50 to 75 residents who might be opposed to Hendrix's reelection. (Miller Aff. Pars. 7-13). Miller also stated that there was no indication that any of these residents were suspected of any criminal activity or other legitimate basis for such investigations . . . The Defendants' harassment and surveillance of the Plaintiffs fall squarely within the retaliatory conduct clearly proscribed by the settled case law of the Supreme Court and the Eleventh Circuit. *Terminiello v. Chicago*, 337 U.S. 1 (1949) at 4; *Georgia Assn. of Educators*, 856 F.2d at 145; *Leslie*, 786 F.2d at 1537; *Cate*, 747 F.2d at 1186. ***Indeed, it is difficult, if not impossible, to fathom that a reasonable officer in the Defendants' position would not recognize that retaliatory surveillance and harassment of political opponents under color of law was a violation of their constitutional rights.*** (Emphasis supplied.)

In its earlier summary judgment order, the District Court described Petitioners' retaliation in even greater detail:[6]

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[6] R14-176-4.

> The actions allegedly taken by Sheriff Hendrix include ordering deputies to follow the Plaintiffs for surveillance purposes; ordering deputies to regularly "stake out" Plaintiff Bennett's residence; on two occasions stopping Plaintiff Tammy Bennett near her residence without probable cause and issuing false and pretextual traffic citations; unlawfully accessing County and State records to obtain confidential information regarding the Plaintiffs to be used for harassment; maliciously using such information to defame Plaintiffs Reid and Bennett; ordering deputies to harass, intimidate and interfere with Plaintiffs Reid and Bennett in the lawful pursuit of their business interests; and attempting to obtain a warrant for the arrest of Plaintiff Reid on false and pretextual grounds. ***Sheriff Hendrix allegedly announced the formation of a "Strike Force" at a staff meeting on February 9, 1999. The purpose of this special force was to carry out the aforementioned intimidating activities***. (Emphasis supplied.)

These allegations, which the District Court found to be supported by competent summary judgment evidence, answer the ultimate issue regarding qualified immunity. In light of existing Eleventh Circuit and Supreme Court precedents, no reasonable officer could fail to instantly recognize that such egregious conduct was unlawful. Certainly, this Court should not condone or encourage such actions by providing immunity to the responsible officers.

Finally, Petitioners argue that granting certiorari would make this case a nice, final piece of a trilogy that "will allow the Court to cohesively clarify the standards applicable to First Amendment retaliation claims and the 'adverse action' requirements of both First Amendment retaliation and Title VII cases."[7] Perhaps. However, Respondents Bennett and Reid filed this action on September 28, 2000, and have already faced two interlocutory

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[7] Pet. 16-17.

appeals on qualified immunity, plus further court-ordered briefing on remand. This case has now lingered for 5½ years without a trial. While qualified immunity is an important legal principle, the First Amendment and § 1983 are of little practical use if the federal system fosters delay, after delay, after delay.

Even the District Court has grown weary of Petitioners' dilatory tactics. In an earlier Order, it wrote:[8]

> This is a civil rights action. It is before the Court on Defendants' Motion for Oral Argument [Doc. 231] on their claim of qualified immunity. The Court is generally inclined to grant requests for oral argument. In this case, however, doing so now would only add to the exorbitant delay in getting this case resolved. This case has been pending for three and one-half years. Procedurally, it is in the exact posture it was in after the Court's ruling on the summary judgment motions two years ago. The Court is not persuaded that oral argument would be of significant benefit. The Defendants' Motion for Oral Argument [Doc. 231] is DENIED.

The date of the above-quoted Order was April 14, 2004, more than two years ago. Yet, in terms of reaching trial, this case remains in "the exact posture it was in after the [District] Court's ruling on . . . summary judgment." Respondents respectfully submit that this Court should decline Petitioners' invitation to facilitate additional lengthy delays. Without further delay, Respondents should be permitted to vindicate their First Amendment rights at trial.

STATEMENT OF THE CASE

In 1996, Petitioner Dennis Lee Hendrix was elected Sheriff of Forsyth County, Georgia. At one time, he was the most popular and powerful political figure in that County. Nevertheless, throughout his term in office, Hendrix used the personnel and resources of his Department to engage in

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[8] R16-234-1.

illegal surveillance and harassment of his perceived political "enemies." The individuals targeted included members of the Forsyth County Board of Commissioners, the Mayor of the City of Cumming, Georgia, the publisher of *The Forsyth County News* and local attorneys who filed lawsuits against the Sheriff's Department.[9] Hendrix's targets also included respected citizens such as Bennett and Reid, who Hendrix believed would oppose his reelection.[10]

Hendrix initially focused his illegal actions against County Commissioners who opposed his budget requests.[11] However, in 1998 a group of private citizens, including Bennett and Reid, formed a committee to sponsor a referendum to establish a countywide police force in Forsyth County.[12] The committee was formed under the name "Forsyth Citizens for Economical Law Enforcement," and was registered according to Georgia law.[13] If the proposed resolution had been approved by the voters in a referendum,

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[9] *See*, review of the evidentiary record in *Plaintiffs' Memorandum of Law in Opposition to Defendants Dennis Lee Hendrix, Earl A. Singletary, David W. Waters and John Does (1-10)'s Motion for Summary Judgment* (R10-141-8-133).

[10] Bennett is a licensed engineer, and an owner of a general contracting construction company. Reid owns a grading company. Bennett and Reid have also been partners in a number of successful real estate developments in Forsyth County. Both men are also founders and directors of The Citizens Bank of Forsyth County. Respondents' 11th Cir. Brief at 13. At his deposition, Hendrix admitted that he never believed Bennett or Reid were "criminals." Hendrix also admitted that, other than an investigation of Reid for an alleged violation of an environmental ordinance, which Respondents contend was pretextual and was dropped after the 2000 Sheriff's election, there was never any criminal investigation of Bennett or Reid during his term. R10-141-115-121.

[11] Respondents' 11th Cir. Brief at 9-10, 12-13.

[12] *See*, *O.C.G.A.* § 36-8-1(a) and (b), which are reproduced at **Appendix A** (p. 1a-2a).

[13] *See*, *O.C.G.A.* § 21-5-30(a), which requires the registration of any "campaign committee" organized to bring about the approval or rejection of any proposal by means of a referendum.

it would have transferred much of the Sheriff's general law enforcement power to the new police force. However, the referendum was defeated in the Summer of 1998.

Major Mark Thomas, a former member of Hendrix's Command Staff who at one time acted as Hendrix's "bodyguard," testified that after the 1998 referendum Hendrix refocused his illegal actions against the citizens who had supported it, principally Bennett and Reid. Thomas testified that at numerous Command Staff meetings Hendrix referred to Bennett and Reid as "thugs" and "criminals."[14] On several occasions, Hendrix stated that he would do "whatever he had to" in order to "dig up some dirt" on Bennett and "run him out" of Forsyth County. Thomas testified that Hendrix made such threats in at least four or five Command Staff meetings, and on numerous other occasions. Thomas further testified that Hendrix's animosity toward Bennett and Reid was directly related to their support of the 1998 referendum.[15] Thomas also testified that, after he left the Department, he learned from other Deputies that Bennett and Reid were on the "list of people that surveillances were being done on."[16]

A second former Deputy, Lt. William Miller, also provided important testimony in this case. Miller testified that at a Command Staff meeting on February 9, 1999 Petitioner Earle Singletary, as Chief Deputy Sheriff, announced in Hendrix's presence that Miller would be transferred to the Internal Affairs Division ("IAD"), and would be working under Petitioner David Waters, who was also being transferred to IAD.[17] Singletary stated that Miller's job at IAD would be to head up a "Strike Force" that was going to "investigate 50-75 residents of Forsyth

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[14] Thomas Affidavit ¶'s 4-7 (R12-143-Tab 19); Thomas Depo. p. 45, l. 16-p. 47, l. 15; p. 107, l. 4-19 (R11-142-Tab 3). This is confirmed by Petitioner Waters' testimony. Waters Depo. p. 123, l. 5-16; p. 174, l. 18-p. 175, l. 8 (R11-142-Tab 11).

[15] Thomas Depo. p. 38, l. 24-p. 39, l. 14 (R11-142-Tab 3).

[16] Thomas Depo. p. 76, l. 21 – p. 77, l. 5 (R11-142-Tab 3).

[17] Miller Affidavit ¶'s 6-10 (R12-143-Tab 20).

County who might be opposed to Sheriff Hendrix's reelection." Singletary also announced that Miller would operate the "Strike Force" under Waters' supervision at IAD.[18]

Miller refused to accept this assignment and resigned from the Sheriff's Department on February 12, 1999.[19] Miller's testimony regarding the formation of the Strike Force prior to the 2000 Sheriff's election is corroborated by consistent contemporaneous statements that he made to Cumming Police Chief Buck Jones,[20] and by Deputies Brian Millard and Daniel Rush, who both testified that the formation of the Strike Force was widely known among experienced Deputies in the Department.[21] The retaliatory actions directed by Petitioners through the Strike Force and otherwise, as summarized by the District Court, have already been noted. The additional evidence supporting Respondents' allegations includes more than 30 depositions and 21 affidavits, and is reviewed in detail in Respondents' summary judgment brief.[22]

REASONS FOR DENYING THE PETITION

Contrary to Petitioners' argument, there is no "circuit split" over the application of the "ordinary firmness" test. The Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and D.C. Circuits have now all adopted that test. Moreover, the First Circuit has applied an identical test to retaliation claims without attaching the "ordinary firmness" label. As shown *infra*, Petitioners' argument that such a split exists is based on conflicting

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[18] Miller Depo. p. 142, l. 18 – p. 143, l. 8; p. 91, l. 9 – p. 92, l. 4; p. 94, l. 2 – p. 95, l. 12 (R11-142-Tab 10).

[19] Miller Affidavit ¶'s 11-12 (R12-143-Tab 20).

[20] Jones Affidavit ¶'s 4-8 (R12-143-Tab 5).

[21] Millard Affidavit ¶'s 13-18 (R12-143-Tab 6); Rush Affidavit ¶'s 8-13 (R12-143-Tab 7).

[22] *See, Plaintiffs' Memorandum of Law in Opposition to Defendants Dennis Lee Hendrix, Earl A. Singletary, David W. Waters and John Does (1-10)'s Motion for Summary Judgment* (R10-141-8-133).

statements by the Second Circuit regarding the factual contexts in which it will apply the "ordinary firmness" test. Petitioners also attempt to bolster their argument with disparate analogies extracted from case law dealing with public employee retaliation claims and Fourth Amendment standing.[23] However, such issues are inapposite in analyzing the "adverse action" element of retaliation claims by private citizens. Simply stated, Respondents submit that none of this amounts to a "circuit split" that justifies this Court's intervention.

There also is no merit to Petitioners' argument that their retaliatory actions did not violate "clearly established" law. Both this Court and the Eleventh Circuit have broadly proscribed such retaliation in numerous decisions that predate Petitioners' deliberate misconduct. Moreover, prior Eleventh Circuit decisions applied an objective standard to retaliation claims that is consistent with the "ordinary firmness" test. Because Petitioners had "fair warning" that their actions would violate Respondents' constitutional rights, the relevant federal law was "clearly established." As the Eleventh Circuit observed in this case:[24]

> Because this Court has held since at least 1988 that it is "settled law" that the government may not retaliate against citizens for the exercise of First Amendment rights, *Ga. Ass'n of Educators*, 856 F.2d at 145, we hold that the defendants were on notice and had "fair warning" that retaliating against the plaintiffs for their support of the 1998 referendum would violate the plaintiffs' constitutional rights and, if the plaintiffs' allegations are true, would lead to liability under § 1983.

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[23] Pet. App. 9a-12a.

[24] Pet. App. 17a.

I. There is No Circuit Split on the Question Presented.

A. Overview of First Amendment Retaliation Claims.

The federal courts have long held that the First Amendment proscribes not only prior restraints on protected activity, but also governmental retaliation for the exercise of such freedoms. *City of Houston v. Hill*, 482 U.S. 451, 462-63 (1987) ("[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state"); *Leslie v. Ingram*, 786 F.2d 1533, 1537 (11th Cir. 1986) ("[a]n intentional and wrongful retaliation for the assertion of a constitutionally protected right is a substantive civil rights violation which may be prosecuted in a federal court pursuant to 42 *U.S.C.* § 1983 . . . "), *abrogated on other grounds by Graham v. Connor*, 490 U.S. 386 (1989).

Three elements must be shown to establish a retaliation claim. First, the conduct in question must be protected under the First Amendment. Secondly, the alleged retaliatory acts must have an adverse effect on the protected conduct. Thirdly, there must be a causal connection between the protected conduct and the adverse action. *Suarez Corp. Industries v. McGraw*, 202 F.3d 676, 685 (4th Cir. 2000). This is precisely the test that the District Court applied in upholding Respondents' retaliation claim.[*]

The issue presented by the Petition relates only to the "adverse action" element. The federal courts have held that determining whether a plaintiff's First Amendment rights were adversely affected by retaliatory action is "a fact intensive inquiry that focuses on the status of the speaker, the status of the retaliator, the relationship between the speaker and the retaliator, and the nature of the retaliatory acts." *Suarez*, 202 F.3d 686; *Thaddeus-X v.*

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[*] R14-176-14-18.

Blatter, 175 F.3d 378, 398 (6th Cir. 1999). Accordingly, "prisoners may be required to tolerate more than public employees, who may be required to tolerate more than average citizens, before an action taken against them is considered adverse." *Id.* at 398. In considering Petitioners' arguments, the Court should keep in mind that Respondents, as private citizens, are entitled to the highest level of protection from retaliation.

B. Development of the "Ordinary Firmness" Test.

The "ordinary firmness" test appears to have originated with Judge Posner's opinion in *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982). That case upheld a retaliation claim brought by a public employee over a series of relatively minor acts of alleged retaliation. In holding that such minor acts may constitute "adverse action," Judge Posner wrote:

> The effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their constitutional rights, it need not be great in order to be actionable. Yet even in the field of constitutional torts de minimis non curat lex. Section 1983 is a tort statute. A tort to be actionable requires injury. It would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise . . . (*Id.* at 625.)

Since its formulation, this test has been adopted by virtually every Circuit. As the Court of Appeals for the District of Columbia noted in *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 585 (D.C. Cir. 2002), the "ordinary firmness" test has become "[t]he widely accepted standard for assessing whether 'harassment for exercising the right of free speech [is] . . . actionable'," *quoting Crawford-El v. Britton*, 93 F.3d 813, 826 (D.C. Cir. 1996). *See, e.g.*, *Bennett v. Hendrix*, 423 F.3d 1247, 1251 (11th Cir. 2005) ("[f]or the

reasons that follow, we join our sister Circuits in adopting an objective test for proving a retaliation claim"); *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005); *Garcia v. City of Trenton*, 348 F.3d 726, 728 (8th Cir. 2003) ("[t]he ordinary-firmness test is well established in the case law"); *Meyers v. Nebraska HHS*, 324 F.3d 655, 659 (8th Cir. 2003); *Mitchell v. Horn*, 318 F.3d 523 (3rd Cir. 2003); *Poole v. Co. of Otero*, 271 F.3d 955, 960 (10th Cir. 2001); *Carroll v. Pfeffer*, 262 F.3d 847, 850 (8th Cir. 2001); *Rauser v. Horn*, 241 F.3d 330, 333 (3rd Cir. 2001); *Allah v. Seiverling*, 229 F.3d 220, 224 (3rd Cir. 2000); *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000); *Suppan v. Dadonna*, 203 F.3d 228, 235 (3rd Cir. 2000); *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) ("[a] retaliation claim [requires] . . . an adverse action . . . that would deter a person of ordinary firmness from continuing to engage in that conduct"); *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998) ("to prove a claim for retaliation, a plaintiff must establish . . . that the defendant's adverse action . . . would likely chill a person of ordinary firmness"); *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982) ("[i]t would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness").

The most often cited benefits of an objective standard are that it "provides notice to government officials of when their retaliatory actions violate a plaintiff's First Amendment rights,"[26] and does not "allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity."[27] Such a test also recognizes that the "injury in fact" in such cases is the punishment inflicted on the plaintiff for exercising protected rights, and that injury is not dependent on his response to the punishment. Simply

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[26] Pet. App. 8a.

[27] *Mendocino Environmental Ctr. v. Mendocino Co.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

stated, the "injury in fact" caused by such punishment is real and immediate, regardless of the plaintiff's reaction to it.

Summarizing these benefits in *Constantine*, 411 F.3d at 500, the Fourth Circuit recently wrote:

> We have never held that a plaintiff must prove that the allegedly retaliatory conduct caused her to cease First Amendment activity altogether. The cause of action targets conduct that tends to *chill* such activity, not just conduct that *freezes* it completely. Moreover, such a subjective standard would expose public officials to liability in some cases, but not in others, for the very same conduct, depending upon the plaintiff's will to fight. We believe that an objective standard better instructs public officials as to their obligations under the First Amendment. Thus, for purposes of a First Amendment retaliation claim under § 1983, a plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter "a person of ordinary firmness" from the exercise of First Amendment rights. . . . While the plaintiff's actual response to the retaliatory conduct provides some evidence of the tendency of that conduct to chill First Amendment activity, it is not dispositive. (Citations omitted.)

C. Petitioners' Response to the Consensus of Case Law Endorsing the "Ordinary Firmness" Test.

Petitioners contend that all of the Circuit Courts that have adopted the "ordinary firmness" test were mistaken. They argue that such an objective test allows a plaintiff to recover who has suffered no "actual injury in fact." Since § 1983 is a tort statute, Petitioners reason, a plaintiff may only recover if he can show that he has actually curtailed his protected activity. To complete their syllogism, Petitioners argue that, because Respondents voted in the 2000 Sheriff's election and made minor campaign contributions

to Hendrix's opponent, as a matter of law they cannot show an "actual chilling."

Because voting and making campaign contributions represent minimal First Amendment activities, Petitioners would, in effect, require a plaintiff to show a complete cessation of protected activity in order to assert a retaliation claim. Petitioners adamantly deny that they are advocating a "complete cessation" standard.[26] However, the only post-retaliation protected activity that Petitioners can point to is that Respondents voted in 2000 and made minor campaign contributions to Hendrix's opponent. If such minimal activities establish as a matter of law that Respondents' rights were not chilled, Petitioners are certainly advocating a "complete cessation" test in fact, if not in name.

Such a draconian standard is not supported by any federal decision. *See, e.g.*, *Constantine*, 411 F.3d at 500 ("[w]e have never held that a plaintiff must prove that the alleged retaliatory conduct caused her to cease First Amendment activity altogether"); *Keenan v. Tejada*, 290 F.3d 252, 260 (5th Cir. 2002) ("[a] required showing of actual injury does not . . . mean that a plaintiff must cease criticizing government officials altogether . . . to have a claim for retaliation"). Moreover, as Respondents noted in their Eleventh Circuit brief, the protected activity in question was not voting or making campaign contributions. It was supporting public initiatives such as the 1998 referendum, and the record is clear that after Petitioners' retaliation Respondents never again engaged in such

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[26] *See*, Petitioners' 11th Cir. Reply Brief at 2, where they state:

> Nor have Appellants argued, as Appellees incorrectly state, that there must be a complete cessation of First Amendment conduct for a plaintiff to have a viable retaliation claim. Rather, Appellants' position is simply that . . . a plaintiff is required to show that the defendants' actions had *some* actual, non-speculative chilling effect on the plaintiffs' First Amendment rights . . .

activity.[29] Thus, if applied with respect to the correct protected activity, Respondents meet even Petitioners' incorrect "complete cessation" test.

D. Petitioners Mischaracterize the Case Law In Order to Argue That There is a Circuit Split.

The fulcrum for Petitioners' argument is their contention that "the Eleventh Circuit's decision is in conflict with decisions of the First and Second Circuits, which have applied the 'actual chilling' test."[30] However, an analysis of the cases cited by Petitioners shows that they cannot reasonably be construed as creating a circuit split. For example, Petitioners point to *Sullivan v. Carrick*, 888 F.2d 1 (1st Cir. 1989), to support their contention that the First Circuit is aligned with them. However, as the Eleventh Circuit noted, *Sullivan* does not actually support this contention. In its opinion, the Eleventh Circuit wrote:[31]

> The defendants also cite *Sullivan v. Carrick*, 888 F.2d 1 (1st Cir. 1989), as adopting an "actual chill" standard. However, the plaintiff there failed to allege any adverse action, and thus could not show sufficient injury to create standing. *Id.* at 4. Moreover, the court noted that the proper standard was whether the plaintiff's "speech was in fact chilled *or intimidated*." *Id.* Therefore, we do not read *Sullivan* to adopt unequivocally a subjective test.

Moreover, in other cases the First Circuit has applied the "ordinary firmness" test's objective standard. In a case decided three years after *Sullivan*, the First Circuit upheld a retaliation claim by a landowner based on the denial of a permit to build a residential complex. *Nestor Colon Medina & Sucesores v. Custodio*, 964 F.2d 32 (1st

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[29] Respondents' 11th Circuit Brief at 45.

[30] Pet. 7.

[31] Pet. App. 18a, n. 4.

Cir. 1992). On summary judgment, the First Circuit held that allegations of a material adverse action (denial of the permit) were sufficient to support a retaliation claim without requiring the plaintiff to show that he had curtailed his protected activities. *Id.* at 41.

In *Agosto-de-Feliciono v. Aponte-Roque*, 889 F.2d 1209, 1218-20 (1st Cir. 1989), the First Circuit also applied an objective standard to a public employee's retaliation claim. Citing *Bart v. Telford*, the First Circuit stated that the "adverse action" element was present "only when the government's actions are sufficiently severe to cause reasonably hardy individuals to compromise their political beliefs and associations." *Id.* at 1217. Respondents submit that the First Circuit's "reasonably hardy individuals" language is the "ordinary firmness" test. Thus, Petitioners' contention that the case law of the First Circuit supports their argument is, at best, an exaggeration.

Petitioners' "circuit split" argument ultimately rests on certain conflicting statements by the Second Circuit. It appears that the Second Circuit first endorsed the "ordinary firmness" test in 1999 in *Davidson v. Chestnut*, 193 F.3d 144 (2nd Cir. 1999). On appeal from summary judgment, the Second Circuit noted that neither party had raised the issue of whether the alleged retaliation was *de minimis*, and suggested that the District Court's final judgment should address this question. *Id.* at 150. The Second Circuit cited the "ordinary firmness" test as the standard under which it would eventually review this issue. *Id.*

Davidson involved a prisoner's retaliation claim. However, in endorsing the "ordinary firmness" test, the Second Circuit did not distinguish prisoner claims from retaliation claims by other plaintiffs. Later Second Circuit decisions involving prisoner claims cited *Davidson* and applied the "ordinary firmness" test, but also did not distinguish prisoner claims from retaliation claims by other plaintiffs. *Davis v. Goord*, 320 F.3d 346, 353 (2nd Cir. 2003); *Dawes v. Walker*, 239 F.3d 489, 493 (2nd Cir. 2001). The Second Circuit also later extended the "ordinary

firmness" test to retaliation claims by public employees. *Hoyt v. Andreucci*, 433 F.3d 320, 328 (2nd Cir. 2006); *Morrison v. Johnson*, 429 F.3d 48, 51 (2nd Cir. 2005); *Washington v. County of Rockland*, 373 F.3d 310, 320 (2nd Cir. 2004).

It was in *Gill v. Pidlypchak*, 389 F.3d 379 (2nd Cir. 2004), that the Second Circuit suggested that the older "actual chill" line of cases that Petitioners rely on might have survived its adoption of the "ordinary firmness" test, at least in one context. *Gill* was a pro se retaliation case brought by a prisoner against correction officers. On appeal from a Rule 12(b)(6) dismissal, the defendants argued that both the "actual chill" test and the "ordinary firmness" test must be applied to such claims. *Id.* at 381. Rather than holding that the "ordinary firmness" test had supplanted its earlier "actual chill" line of cases, the Second Circuit engaged in a hypothetical analysis of three alternative approaches under which it might resolve this apparent conflict. *Id.* at 381-84.

Ultimately, the Second Circuit decided not to adopt any of these three approaches, and instead left this issue unresolved. After analyzing each alternative, the Second Circuit stated:[22]

> We need not, however, choose among these various possibilities to decide the case before us today. Our holding does not depend on an analysis particular to any of them, for our undertaking here is "merely to determine whether the complaint itself is legally sufficient." *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985). And under each approach, this plaintiff has articulated a First Amendment retaliation claim sufficient to survive defendants' motion to dismiss.

Later Second Circuit cases have suggested that the "actual chill" test may still apply to retaliation claims by private citizens, despite that Court's adoption of the

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[22] 389 F.3d at 384.

"ordinary firmness" test for prisoner and public employee claims.[23] However, with due respect to the Second Circuit, it is illogical even to consider imposing a more stringent test on retaliation claims by private citizens than on claims by prisoners and public employees. As other Circuits have noted, this is not a static inquiry but depends "on the status of the speaker, the status of the retaliator [and] the relationship between the speaker and the retaliator." *Suarez*, 202 F.3d at 686. In the prisoner and public employee contexts, there are substantial governmental interests that must be balanced against the plaintiff's First Amendment rights. Such countervailing interests simply do not apply to retaliation claims by private citizens. Therefore, the federal courts have consistently held that "prisoners may be required to tolerate more than public employees, who may be required to tolerate more than average citizens, before an action taken against them is considered adverse." *Thaddeus-X*, 175 F.3d at 398.

Even the Second Circuit decisions that apply the "ordinary firmness" test recognize this tiered approach to First Amendment protection. In *Davis v. Goord*, 320 F.3d at 353, the Second Circuit wrote:

> "Only retaliatory conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights constitutes an adverse action for a claim of retaliation." *Dawes*, 239 F.3d at 493. *See also Thaddeus-X v. Blatter*, 175 F.3d 378, 398 (6th Cir. 1999) (retaliation against an inmate must be likely to "chill a person of ordinary firmness from continuing to engage" in a protected activity). "Otherwise the retaliatory act is simply *de minimis* and therefore outside the ambit of constitutional protection." *Dawes*, 239 F.3d at 493. In making this determination, the court's inquiry must be "tailored to the different circumstances

[23] Pet. 9-10. Respondents note that virtually all of the post-*Gill* decisions cited by Petitioners are unpublished opinions.

> in which retaliation claims arise," ***bearing in mind that "[p]risoners may be required to tolerate more . . . than average citizens, before a [retaliatory] action taken against them is considered adverse."*** *Id.* (*quoting Thaddeus-X*, 175 F.3d at 398). (Emphasis supplied.)

See, also, Dawes, 239 F.3d at 493 ("[t]he objective inquiry is not 'static across contexts,' . . . '[p]risoners may be required to tolerate more than public employees, who may be required to tolerate more than average citizens' . . . " (citations omitted)).

Thus, a two-headed test under which prisoners and public employees are protected against the *potential* suppression of their protected activities, while private citizens are protected only where such activities have *actually* been suppressed, conflicts with the fundamental precept that private citizens are entitled to the highest level of First Amendment protection. In this case, the Eleventh Circuit also recognized the paradoxical consequences of such a test and stated:[34]

> We note that several courts have applied the "ordinary firmness" test even in the prison context. It follows that a private citizen, not subject to the expected deprivations of prison life, deserves at least as much protection from retaliation. (Citations omitted.)

For the Court's present purpose, the point is simply that the uncertainty in the Second Circuit engendered by *Gill v. Pidlypchak* does not rise to the level of a circuit split. Accordingly, the Court should not grant certiorari to resolve a nonexistent split. Respondents also respectfully submit that, if the Court wishes to resolve the uncertainty within the Second Circuit's decisions, it would be more appropriate to do so in a Second Circuit case.

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[34] Pet. App. 19a, n. 6.

II. Certain Other Issues Raised by Petitioners Are Simply Irrelevant.

To buttress their "circuit split" argument, Petitioners also argue by analogy to cases that address different legal issues. For example, Petitioners cite the Court's holding in *Laird v. Tatum*, 408 U.S. 1 (1972), that a plaintiff must allege more than a "mere subjective chill." However, the issue in *Laird* was whether a plaintiff who had not been individually surveilled by the government had standing to assert a Fourth Amendment claim.[35] Here Respondents allege that they were individually targeted and retaliated against by Petitioners, and therefore they clearly meet *Laird*'s test for standing. *Meese v. Keene*, 481 U.S. 465, 473 (1987) (allegation of harm to "personal, political and professional reputation" satisfies *Laird's* standing requirement); *Riggs v. City of Albuquerque*, 916 F.2d 582, 584-86 (10th Cir. 1990) (lawyers and political activists who were targets of illegal surveillance by intelligence unit of city police department in connection with mayoral election had standing under *Laird* and *Meese v. Keene*).

Therefore, Petitioners' argument that "the 'actual chilling' test is consistent with the injury-in-fact requirement of federal justiciability law ... [and] *Laird v. Tatum*"[36] is misplaced. Petitioners' contentions are neither consistent nor inconsistent with *Laird*. The two cases present different issues.

In their Eleventh Circuit brief, Petitioners also argued by analogy to public employment decisions from the Eleventh Circuit such as *Stavropoulos v. Firestone*, 361 F.3d 610, 616 (11th Cir. 2004), *cert. denied*, 161 L. Ed.2d 727, 125 S. Ct. 1850 (2005). *Stavropoulos* reaffirmed that,

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[35] In a First Amendment retaliation case, the plaintiff would have to prove a causal connection between the protected activity and the retaliation as part of his prima facie case. Therefore, by definition, all such First Amendment plaintiffs must have been individually targeted, and satisfy *Laird*.

[36] Pet. 16.

in order to state a retaliation claim, a public employee must show an "adverse employment action."[37] However, it is well established that in the public employment context the interests of the governmental employer must be balanced against the First Amendment rights of the employee. *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). Recognizing this, the Eleventh Circuit held that "[t]he defendants' reliance on retaliation cases in the public employment context is misplaced, because different interests are at stake there."[38] Thus, neither *Laird* nor the public employee cases actually strengthen Petitioners' argument.

III. In This Case, Respondents Meet Any Potential "Adverse Action" Test, and Have Unquestionably Incurred an Actionable Injury.

As part of their argument, Petitioners represent that:[39]

> Respondents have produced no legally sufficient evidence indicating any actual change or curtailment of their First Amendment activities as a result of Petitioners' alleged conduct. In fact the evidence shows just the opposite: that Respondents continued to exercise their First Amendment rights in spite of Petitioners' alleged retaliatory conduct.

Petitioners have mischaracterized the evidentiary record. In actuality, the record shows that Respondents were "chilled" in the exercise of their First Amendment rights, and that they meet any potential "adverse action" test the courts may apply.[40] Both Bennett and Reid testified that

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[37] Petitioners' 11th Cir. Brief at 12-13 and Petitioners' 11th Cir. Reply Brief at 21, 22-23.

[38] Pet. App. 9a.

[39] Pet. 13-14.

[40] Respondents' 11th Cir. Brief at 44-45.

Petitioners' retaliation made them less likely to engage in protected activity such as the 1998 referendum. For example, Bennett testified:[41]

> Q Let me ask you if your experience with the surveillance and the activity by Sheriff Hendrix that you allege in your Complaint and the brochures, let me ask you if that has made you less willing or unwilling to be involved with political process?
>
> A Absolutely.
>
> Q Has it made you more reluctant to get involved in political issues and voice your opinion on political issues?
>
> A Yes.

Petitioners scoff at Respondents' testimony, labeling it "self-serving, speculative, and conclusory."[42] However, Petitioners fail to inform the Court that Respondents' testimony is indistinguishable from testimony that the Fifth Circuit held sufficient to show an "actual chill" in a case relied upon by Petitioners. In *Keenan v. Tejada*, 290 F.3d at 260, the Fifth Circuit wrote:

> The district court clearly erred, however, in finding that the plaintiffs made no showing of an injury. In his affidavit, Keenan explained that after the incidents in June 1997 and December 1997, he was afraid to travel in Precinct 5 and he "backed off from direct involvement in helping expose unlawful practices" in the constable's office . . . Przybylski made similar assertions in his affidavit. ***Thus, both plaintiffs have stated, without contradiction, that they curtailed their protected speech activities in response to the defendants' actions . . . A required showing of actual injury does not necessarily mean that plaintiffs must cease criticizing the government officials***

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[41] Bennett Depo. Tr. p. 278, l. 23 – p. 279, l. 7 (R11-142-Tab 2).

[42] Pet. 14, n. 5.

> ***altogether in order to have a claim for retaliation***. (Citations omitted; emphasis supplied.)

It is also illogical for Petitioners to argue for a subjective test, and then insist that the victims' testimony regarding their reaction to the retaliation must be disregarded. Petitioners can't have it both ways. Moreover, in many retaliation cases the only evidence available to establish an "actual chill" is the victim's testimony. Indeed, one serious flaw in a subjective test is that it gives the courts no guidelines to divine the metaphysical question: which protected activities did the victim *not* engage in?

To support their argument, Petitioners point solely to the fact that Respondents voted and made minor campaign contributions to Hendrix's opponent in the 2000 election. As noted *supra*, that is the wrong protected activity. Petitioners' retaliation was not in response to Respondents' voting or campaign contributions. It was in direct response to Respondents' support of a public referendum initiative that Hendrix opposed, and the record shows that neither Bennett nor Reid have engaged in similar activity after Petitioners' retaliation.[43] Therefore, as applied to the correct protected activity, Respondents meet even Petitioners' incorrect "complete cessation" test. Respondents also submit that any test under which a private citizen forfeits his First Amendment protection simply by voting and making minor campaign contributions is inherently wrong.

However, the most glaring defect in Petitioners' argument is that it ignores the fact that a First Amendment retaliation claim may be based on an injury other than the actual or likely suppression of the plaintiff's protected activities. As the Second Circuit wrote in the case on which Petitioners principally rely, *Gill v. Pidlypchak*, 389 F.3d at 383:

> Indeed, even in certain cases involving public official/private citizen retaliation claims, we have

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[43] Respondents' 11th Cir. Brief at 45, and n. 31.

> seemingly not imposed a subjective chill requirement where some other harm is asserted ... Under this approach, standing is no issue whenever the plaintiff has clearly alleged a concrete harm independent of First Amendment chilling. It is only a problem where no harm independent of the First Amendment is alleged. For there, the only injury is the chilling itself.

In this case, the District Court has already held that Respondents submitted competent summary judgment evidence to establish such independent "concrete harm":[44]

> In his affidavit and deposition testimony, former Deputy Mark Thomas testified that in command staff meetings beginning around the time of the 1998 Referendum, Hendrix repeatedly referred to Plaintiffs as "criminals" and "thugs" and vowed to drive them out of Forsyth County. Allen and Cunard[45] testified that at least three of the construction inspectors under their supervision expressed the opinion that Lockhart was targeting, or "leaning heavy", on projects where Bennett and/or Reid were involved. (Deposition of Tim Allen, pp. 55-56, 105-106; Deposition of John Cunard, p. 35). Also, Plaintiff Reid testified in his deposition about specific problems that the Defendants' actions caused with Nix-Fowler, the general contractor on a project which Defendant Lockhart often targeted. (Deposition of Danny Reid, pp. 22, 24-25, 195). Reid also testified that after Lockhart's investigation began, Nix-Fowler had several jobs in Forsyth County that the company did not ask Plaintiff Reid to bid on. (Deposition of Danny Reid, pp. 27-28). He further stated that a draw check was held by Nix-Fowler for a period after Lockhart sent a letter to that company alleging

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[44] R14-176-43.

[45] Tim Allen and John Cunard are, respectively, the Assistant County Engineer and County Engineer of Forsyth County. *See*, R11-142-Tabs 16 and 17.

> that Reid was engaged in "open dumping" of the recovered asphalt from an investigated construction site. (Deposition of Danny Reid, pp. 27, 28). Plaintiffs submit, as Reid's testimony indicates, that Lockhart's actions retarded and made the performance of Reid's obligations under the contract with Nix-Fowler more difficult, causing a draw to be withheld and costing Reid the promised opportunity to bid on future projects with Nix-Fowler in Forsyth County. Defendants point out in their brief that there was no damage to Reid's relationship with Nix-Fowler because "Plaintiff Reid's testimony shows he still works for Nix-Fowler." (Defendant Lockhart's Brief in Support of his Motion for Summary Judgment, p. 14). However, the testimony cited in Lockhart's Brief shows that as of the date of Plaintiff Reid's deposition, he was finishing up the previous project for Nix-Fowler that was the target of Lockhart's investigation. Reid's actual testimony, as set out above, was that he believed that Lockhart's actions damaged his relationship with Nix-Fowler to the point that the company backed off of its promise to work with him on future projects in Forsyth County.

Based on this evidence, the District Court upheld Respondents' state law claims for tortious interference with contractual and business relations. The record further shows that, as the result of Petitioners' retaliation: (1) both Bennett's and Reid's businesses were damaged,[46] (2) Bennett and Reid experienced difficulty in obtaining public support for rezoning in connection with their development projects,[47] and (3) a complaint was filed with the Georgia Department of Banking and Finance ("DBF")

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[46] Bennett Depo. Tr. p. 65, l. 7 – p. 66, l. 19 (R9-120); p. 171, l. 9 – p. 172, l. 6 (R11-142-Tab 2); Reid Depo. Tr. p. 17, l. 4 – p. 18, l. 1; p. 107, l. 9 – p. 108, l. 12; p. 118, l. 21 – p. 119, l. 3; p. 123, l. 8 – p. 125; l. 9; p. 129, l. 6-12 (R11-142-Tab 4).

[47] Bennett Depo. Tr. p. 65, l. 7 – p. 66, l. 9 (R9-120).

regarding Bennett's and Reid's positions as directors of The Citizens Bank of Forsyth County, which led to a DBF investigation.[48]

For example, Bennett gave the following testimony:[49]

> Q In what way has Hendrix or Singletary or Waters gone after you and Mr. Reid in the lawful pursuit of your business interests?
>
> A Well, goodwill is a big part of my business. Most of it's negotiated work. We started out in 1987, we did bid work until about probably 1989, and from then on everything we got was negotiated.
>
> For people to negotiate with you, they can't get a flier from the sheriff saying you're a criminal. I mean, that's part of the goodwill part of being able to negotiate a contract.
>
> We've had to go out and basically work in other counties. We're working in Dawson County and our volume has went down as a result of people thinking we're criminals.
>
> Q Name somebody. Because earlier I thought you said you didn't know somebody.
>
> A Name somebody, what?
>
> Q That you've lost business from or that you weren't allowed to do business for because . . . of these fliers.
>
> A I think what I just said is I have to go outside the county to work; I mean I'm having to work in Dawson County. My volume has went down. The people that I don't get contracts with are people that I never hear from.
>
> There's instances where we're trying to buy a piece of property from – we're trying to get a piece of property re-zoned and Mr. Reid goes and talks to this lady and says, "We want to get this

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[48] *See*, Affidavit of Timothy M. Perry, R12-143-Tab 16.

[49] Bennett Depo. Tr. p. 65, l. 7 – p. 66, l. 19 (R9-120).

> property re-zoned," and she says, "Well, I don't want to deal with you because your partner is a crook." He says, "Who?" "Danny Bennett, he's a crook. I don't want to deal with him."
>
> So here we are trying to get something re-zoned, and we can't do it because people think we're criminal.

Given this record, Petitioners' contention that Respondents suffered no actionable injury as the result of their retaliatory actions borders on frivolous.

IV. The Law Was "Clearly Established" at the Time of Petitioners' Retaliation.

Petitioners' argument that the law was not "clearly established" at the time of their retaliation against Respondents also has no merit. The Eleventh Circuit held that it is "settled law" that the "government may not retaliate against citizens for the exercise of First Amendment rights,"[50] and that, at the time Petitioners retaliated against Respondents, that principle applied with "obvious clarity," and gave Petitioners' "fair warning" that their actions would violate Respondents' constitutional rights.[51] *Vinyard v. Wilson*, 311 F.3d 1340, 1350-52 (11th Cir. 2002) (where a constitutional right is established with "obvious clarity," a plaintiff need not point to factually similar cases to defeat qualified immunity).

Even Petitioners cannot directly dispute the Eleventh Circuit's conclusion. Instead, they circumvent it by presupposing that if the Eleventh Circuit had not yet adopted the "ordinary firmness" test, the law could not be clearly established. They then argue by analogy to cases in which the law truly was unsettled. *E.g.*, *Wilson v. Layne*, 526 U.S. 603 (1999). However, there are at least two basic flaws in this argument.

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[50] Pet. App. 17a.

[51] Pet. App. 16a.

First, the test for qualified immunity is not whether every legal nuance that might apply to a defendant's conduct was immutably fixed at the time he acted. It is simply whether "in light of already-existing law, the unlawfulness of the conduct is 'apparent' "[52] to a reasonable officer in the defendant's circumstances.[53] Petitioners do not dare to suggest that a reasonable officer would have believed that their actions were lawful. Instead, they circuitously argue that if a Sheriff and his senior deputies are contemplating political retaliation and correctly guess that the targeted citizens will vote anyway, then it is "objectively reasonable" for them to proceed with the retaliation.[54] However, this argument conflicts with this

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[52] Pet. App. 16a.

[53] A leading treatise on § 1983 frames this test as follows:

> It is obviously to the advantage of plaintiffs to approach the clearly settled law inquiry at a general level, and to the advantage of defendants to approach it at a fact-specific level. After *Anderson v. Creighton*, it must now be approached at a fairly fact-specific level, but a case on all fours is not required. In making this inquiry, courts determine the extent to which the relevant constitutional doctrine is developed in the context of similar or analogous fact patterns. What should be uppermost here is one of the purposes of the qualified immunity defense: fair warning to potential defendants who should not have to predict constitutional law developments. Thus, the clearly settled law inquiry after *Anderson* is a practical as well as a legal one: would a reasonable person in defendant's situation have known that he or she was violating constitutional law? Or, in *Anderson*'s words: "The contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right."

S. Nahmod, *Civil Rights and Civil Liberties Litigation* (4th ed.) § 8.18, at p. 8-61.

[54] *See*, Petitioners' 11th Cir. Brief at 23, where Petitioners argued that "reasonable government officials in [Petitioners'] position would not know that an actionable First Amendment retaliation claim . . . may exist where the evidence shows plaintiffs suffered no 'actual chilling' of their First Amendment rights as a result of their allegedly retaliatory conduct."

Court's precedents because it relies on events that occur after the retaliation, rather than the circumstances that exist at the time of the defendant's actions.

Second, Petitioners' argument ignores the fact that the Eleventh Circuit has long applied an objective standard in First Amendment retaliation cases. The Eleventh Circuit recognized this, and wrote:[55]

> As a final reason for approving of the objective standard, we note that it is consistent with statements in our own cases, even though we have not explicitly adopted the "ordinary firmness" test. In *Cate v. Oldham*, 707 F.2d 1176 (11th Cir. 1983), we enjoined a malicious prosecution action filed by state officials in retaliation against a citizen's lawsuit against those officials. *Id.* at 1190. We noted that "petitioner-appellant alleges more than that his freedom to exercise his right to petition will be chilled in the future. He alleges current deprivation, in the form of penalization of having exercised his right to petition in the past." *Id.* at 1188. We went on to state, "this does not mean, however, that only if a plaintiff can prove actual, current chill can he prove irreparable injury. On the contrary, direct retaliation by the state for having exercised First Amendment freedoms in the past is particularly proscribed by the First Amendment." *Id.* at 1189. Thus, we did not focus on the plaintiff's subjective, actual chilling. Instead, we objectively assessed the defendants' actions and declared that an actual chill is not necessary to state a First Amendment violation: "The *source* of that chill . . . provides the critical irreparable injury to those citizens, regardless of whether actual chill is proved." *Id. see also Holloman v. Harland*, 370 F.3d 1252, 1268-69 (verbal censure from school official for student's silent protest during recitation of Pledge of Allegiance was a punishment intended

[55] Pet. App. 13a.

> "to dissuade [student] from exercising a constitutional right" and "cannot help but have a tremendous chilling effect on the exercise of First Amendment rights").

The Eleventh Circuit's conclusion was exactly right. Petitioners' argument also fails because they had "fair warning" under prior decisions such as *Cate* and *Ga. Assn. of Educators* that the Eleventh Circuit applies an objective standard to First Amendment retaliation claims. "Fair warning" is all that was required in order for the law to be "clearly established." *Hope v. Pelzer*, 536 U.S. 730 (2002). Tellingly, Petitioners cite no case in which the Eleventh Circuit applied an "actual chilling" test, much less the de facto "complete cessation" test that they urge this Court to adopt.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

O.C.G.A. § 36-8-1(a) and (b)

(a) The county governing authority shall have authority to elect or appoint such number of county police as in its discretion it deems proper, provided that the county governing authority complies with the provisions of this Code section. Any person elected or appointed to the county police shall possess the qualifications prescribed in Code Section 35-8-8.

(b)(1) Each county governing authority may authorize, through proper resolution or ordinance, the creation of a county police force. No resolution or ordinance adopted pursuant to this paragraph shall become effective until the governing authority of the county has submitted to the qualified electors of the county the question of whether the resolution or ordinance shall be approved or rejected. The county governing authority shall establish the date of the election in compliance with Code Section 21-2-540, which shall be not less than 30 days after the call of the election, and shall notify the county election superintendent of its decision as to the date. The election superintendent shall issue the call for the election and shall specify that the election shall be held on the date determined by the county governing authority. The election superintendent shall cause the date and purpose of the election to be published once a week for two weeks immediately preceding the date thereof in the official organ of the county. The ballot shall have written or printed thereon the following:

> "( ) YES Shall the resolution or ordinance adopted by the governing authority of (Name of County) to create a
>
> ( ) NO county police force be approved?"

(2) Those persons desiring to vote in favor of the creation of a county police force shall vote "Yes," and those persons opposed to the creation of a county police force shall vote "No." If more than one-half of the votes cast on the question are in favor of the creation of a county police force, then the county governing authority shall be authorized to create a county police force pursuant to the provisions of this chapter; otherwise, a county police force shall not be created. If the resolution or ordinance is rejected by the qualified electors, the question of the creation of a county police force may not again be submitted to the voters of the county within 48 months immediately following the month in which such election was held. The county election superintendent shall hold and conduct the election under the same rules and regulations as govern special elections, except as otherwise provided in paragraph (1) of this subsection. He shall canvass the returns and declare and certify the result of the election to the Secretary of State. The expense of any such election shall be borne by the county wherein the election was held.

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No. 05-989

IN THE

Supreme Court of the United States

DENNIS LEE HENDRIX, Individually and in his Official capacity as Sheriff of Forsyth County, EARL A. SINGLETARY, Individually and in his Official Capacity as Chief Deputy Sheriff of Forsyth County, DAVID W. WATERS, Individually and in his Official Capacity as a Deputy Sheriff of Forsyth County, PETITIONERS

v.

DANNY M. BENNETT AND DANNY L. REID

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

COME NOW Petitioners and file this Reply Brief in Support of their Petition for Writ of Certiorari, showing this Honorable Court as follows:

Since the filing of the Petition for Writ of Certiorari in this case, the Second Circuit has, once again, clearly expressed that it has adopted the actual chilling test as the appropriate standard to apply when assessing whether a private citizen plaintiff has suffered an adverse action sufficient to support a First Amendment retaliation claim.

Specifically, in Ford v. Reynolds, the Second Circuit expressly noted that "[t]he allegation of a chill is indispensable" and "an essential element of a First Amendment retaliation claim" for "private plaintiffs." 167 Fed. Appx. 248, 250 (2d Cir. 2006) ("As to the First Amendment retaliation claim, a plaintiff must allege[, among other things,] the defendant's action effectively chilled the exercise of the plaintiff's First Amendment rights."); see also Fabich v. Custer, 2006 U.S. Dist. LEXIS 62673, at *6 (D. Conn. Sept. 5, 2006) ("[T]he plaintiff fails to address at all the defendants' argument that plaintiff has failed to demonstrate that the defendants' conduct chilled her speech. Therefore, the defendants are entitled to summary judgment on the plaintiff's First Amendment claim."); Woodmansee v. Mickens, 2006 U.S. Dist. LEXIS 24287, at *17 (D. Conn. Mar. 22, 2006) ("To prevail on this free speech claim, plaintiff must prove[, among other things,] defendants' actions effectively chilled the exercise of his First Amendment rights.") (citing Connell v. Signoracci, 153 F.3d 74, 79 (2d Cir. 1998)).

Likewise, the First Circuit also expressly adopted an actual chilling test to private citizen retaliation claims in Sullivan v. Carrick:

> To show a First Amendment violation in this context [plaintiff] must allege that his speech was in fact chilled or intimidated by [defendant's alleged retaliatory conduct].

888 F.2d 1, 4 (1st Cir. 1989) (emphasis added).

Respondents' suggestion that the First Circuit has not really established an actual chilling test in the private citizen context, (Resps' Br. at 15-16), simply ignores the express language of Sullivan. Indeed, since the filing of the Petition in this matter, Sullivan has, again, been cited within the First Circuit to require an actual chilling as a necessary element of a private citizen First Amendment retaliation claim. See, e.g., Royer v. Shea, 2006 U.S. Dist. LEXIS 33270, at *14 (D. Maine May 17, 2006) ("[Defendant's assertion that the amended complaint fails to allege any chilling effect on the plaintiff's exercise of his right to freedom of speech is correct. This omission is fatal. Sullivan v. Carrick, 888 F.2d 1, 4 (1st Cir. 1989) (plaintiff must allege that his speech was in fact chilled or intimidated by defendant's conduct); see also Singer v. Fulton County Sheriff, 63 F.3d 110, 120 (2d Cir. 1995) (failure to allege actual chilling of speech; plaintiff failed to plead a viable First Amendment claim).").

Moreover, Respondents' reliance on Nestor Colon Medina & Sucesores v. Custodio, 964 F.2d 32 (1st Cir. 1992) and Agosto-de-Feliciano v. Aponte-Roque, 889 F.2d 1209 (1st Cir. 1989), (Resps' Br. at 15-16), is misplaced as neither of those decisions involved a

private citizen retaliation claim, such as that at issue here. Cf. Nestor Colon, 964 F.2d at 40-41 (alleging retaliation in the form of denial of a public benefit); Agosto-de-Feliciano, 889 F.2d at 1213 (alleging retaliation based on government employee's political association). In fact, no First Circuit decision or any district court decision within the First Circuit has ever cited Nestor Colon or Agosto-de-Feliciano as support for an ordinary firmness test for private citizen retaliation claims.

For the foregoing reasons and those stated in the Petition for Writ of Certiorari, Petitioners respectfully maintain that certiorari is warranted.

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